89-1264

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CROWN CORK & SEAL CO., INC.,
Petitioner,

v.

ELIZABETH MCNASBY, CATHERINE BERES, HENRIETTA ELLIOTT, MARGARET FELMEY, ANN JACYSZYN, VIRGINIA KNOWLES, LORRAINE MASON, EDITH MCGRODY, BETTY (PONATH) MOYER, JOAN MURPHY, ELEANOR NEYER, MARIE PEKALA and DORIS YOCUM, on behalf of themselves and all others similarly situated,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Court of Appeals' holding—that judgments of the Pennsylvania courts affirming a decision of the Pennsylvania Human Relations Commission do not preclude a subsequent Title VII suit based on the same claims in federal court—conflicts with this Court's decision in *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982), and violates the federal full faith and credit statute, 28 U.S.C. § 1738.

2. Whether and under what circumstances 28 U.S.C. § 1738 and Title VII require or permit a federal court to give greater preclusive effect to a prior state court judgment than would be given under that State's law.

3. Whether the Court of Appeals' construction of 43 Pa. Cons. Stat. Ann. § 962(b), which creates different rules for two classes of litigants defending against functionally identical claims under state and federal law, violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

PARTIES BELOW

In addition to the parties listed in the caption, Local 266 of the Sheet Metal Production Workers' Union was a party in the Court of Appeals.

STATEMENT PURSUANT TO RULE 29.1

This Petition is filed on behalf of Crown Cork & Seal Co., Inc., which has no parent company but has the following subsidiaries (except wholly-owned subsidiaries): Crown Corks of Malaysia; The Crown Cork & Seal Company (Nigeria) Ltd.; Canmakers (Nigeria) Ltd.; Crown Cork del Peru, S.A.; and Metalinas, S.A.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Crown Cork & Seal Company, Inc., respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 888 F.2d 270 (3d Cir. 1989), and is reproduced in the appendix to this petition at 1a. The Court of Appeals' order denying rehearing is reproduced at App. 49a.

The order and judgment of the United States District Court for the Eastern District of Pennsylvania (Giles, J.) is reported at 698 F. Supp. 1264 (E.D. Pa. 1988) and is reproduced at App. 29a.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on October 11, 1989. A timely petition for rehearing and rehearing *en banc* was denied on November 8, 1989. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

APPLICABLE STATUTES

28 U.S.C. § 1738 provides in relevant part:

> "[t]he . . . judicial proceedings of any court of any such State . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . ."

Section 962(b) of the Pennsylvania Human Relations Act, 43 Pa. Cons. Stat. Ann. § 962(b) (Purdon Supp. 1989), provides in relevant part:

> "[N]othing contained in the [PHRA] shall be deemed to repeal or supersede any of the provisions of any existing or hereafter adopted municipal ordinance, municipal charter or of any law of this Commonwealth relating to discrimination because of race, color, religious creed, ancestry, age, sex, national origin, or handicap or disability, but as to acts declared unlawful by [the PHRA] the procedure herein provided shall, when invoked, be exclusive and the final determination therein shall exclude any other action, civil or criminal, based on the same grievance of the complainant concerned. If the complainant institutes any action based on such grievance without resorting to the procedure provided in this act, such complainant may not subsequently resort to the procedure herein."

STATEMENT

This lawsuit was brought in September, 1982 under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, as a purported class action on behalf of female workers at petitioner Crown Cork & Seal Co., Inc. ("Crown Cork").[1] Elizabeth McNasby was the only plaintiff (even though thirteen were named) who ever filed a discrimination charge with the Equal Employment Opportunity Commission ("EEOC"). The district court complaint alleged that Crown Cork and the Sheet Metal Production Workers' Union, Local 266, engaged in a pattern and practice of sex discrimination during the period October 17, 1970 to the filing of the complaint in 1982. The claims raised by the district court complaint were the same claims that had been made previously in proceedings before the Pennsylvania Human Relations Commission ("PHRC") and in the Pennsylvania appellate courts.

1. *The administrative proceedings.* In February 1970, respondents—who were female employees of Crown Cork —visited the PHRC and alleged that Crown Cork and the union had discriminated against female employees. However, none of them filed a complaint. In December 1970, the PHRC filed a "Commissioner's Complaint" on behalf of all female employees of Crown Cork, alleging in general terms that Crown Cork and the union had violated the Pennsylvania Human Relations Act ("PHRA"), 43 Pa. Cons. Stat. Ann. §§ 951 *et seq.*[2] App. 5a-6a. Re-

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[1] The jurisdiction of the District Court was invoked under 42 U.S.C. § 2000e-5(f), and 28 U.S.C. §§ 1331, 1343.

[2] Section 955 of the Pennsylvania statute provides in revelant part:

"It shall be an unlawful discriminatory practice, unless based upon a bona fide occupational qualification . . .

(a) For any employer because of the . . . sex . . . of any individual to . . . discriminate against such individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment, if the individual is the best able and most competent to perform the services required."

spondent McNasby filed her own charge of sex discrimination with the EEOC on May 17, 1971, based on the same allegedly discriminatory actions; she also filed her own complaint with the PHRC in June 1971. *Id.* 6a.

Based on an intervening Pennsylvania Supreme Court decision requiring specificity in Commissioner's complaints, an amended Commissioner's Complaint was filed in October 1975. App. 7a. The amended complaint contained class-wide charges of sex discrimination as well as individual charges on behalf of respondents. The two Commissioner's Complaints were joined with McNasby's for purposes of the administrative proceedings before the PHRC. *Id.* The PHRC conducted full public hearings that consumed 37 days and created a voluminous record, including 6,000 pages of transcript. The Commission issued a 68-page "Findings of Fact, Conclusions of Law, Opinion and Final Order." McNasby's private counsel and the PHRC General Counsel sought and obtained reconsideration by the Commission. McNasby submitted due process challenges; the PHRC General Counsel submitted additional evidence and a lengthy memorandum of law that made up an additional 166 pages of the record. After reconsideration, the Commission issued a supplementary opinion and order upholding the original order.

The PHRC awarded broad injunctive relief to the class. App. 8a. Monetary relief was limited, however, for two reasons. First, the PHRC found that there was an " 'absence of sufficient evidence relating to the period following December 31, 1975' from which monetary damages could be calculated," and thus awarded no damages for that period of time. *Id.* (quoting the PHRC opinion). Second, the PHRC found that the original Commissioner's Complaint was defective and therefore did not toll the PHRA's 90-day statute of limitations with respect to the class, and that the 1975 amended Commissioner's Com-

plaint did not relate back to the earlier complaint. Thus the PHRC found that the class claims that allegedly occurred more than 90 days before October 27, 1975 (when the amended Commissioner's Complaint was filed), were barred. McNasby, who had filed her own complaint in 1971, received backpay from the date of her PHRC complaint until the end of 1975. *Id.*

2. *The state court proceedings.* McNasby filed an appeal with the Pennsylvania Commonwealth Court on October 29, 1981. That court has "exclusive jurisdiction of appeals from final orders of . . . Commonwealth agencies . . . ." 42 Pa. Cons. Stat. Ann. § 763(a). On September 28, 1983, the Commonwealth Court affirmed the order of the PHRC. *Murphy v. PHRC*, 77 Pa. Commw. 291, 465 A.2d 740 (1983). In so doing, the court rejected respondents' arguments, *inter alia*, that the statute of limitations had been tolled in 1970; that the PHRC had deprived respondents of due process and equal protection; and that the PHRC abused its discretion by failing to award relief to the class for violations before July 30, 1975 and after December 31, 1975. See App. 9a-10a.

The order of the Commonwealth Court was affirmed by the Pennsylvania Supreme Court, *Murphy v. PHRC*, 506 Pa. 549, 486 A.2d 388 (1985), and this Court dismissed respondents' appeal for want of a substantial federal question. *Murphy v. PHRC*, 471 U.S. 1132 (1985). See App. 10a.

3. *The District Court proceedings.* While her state court appeals were being pursued, McNasby amended her EEOC charge. She filed this action in the District Court under Title VII, on behalf of a class of female Crown Cork employees. The action was "based on essentially the same facts as the PHRC action." App. 10a (footnote omitted). The case was stayed pending the outcome of the state court litigation.

The District Court granted Crown Cork's motion for summary judgment and dismissed the complaint with

prejudice, on the ground that it was barred by the state court judgments.[3] See App. 29a-46a. In a thorough opinion, the District Court applied Pennsylvania preclusion law as required by 28 U.S.C. § 1738 and this Court's decision in *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982), ruling that McNasby's action was barred both under the PHRA and Pennsylvania common law. See App. 31a-44a.

As to the Pennsylvania statute, the District Court noted Crown Cork's position that the statute is virtually identical to the New York statute held to be preclusive in *Kremer*, App. 32a, and concluded that "[p]laintiff has not shown the existence of any exceptions to the PHRC preclusion statute . . . ." *Id.* 36a. As to Pennsylvania common law, the District Court found that "there is no question that plaintiff's present action is based on the same set of facts litigated at the state level." *Id.* 35a. It explained:

> "The fact that McNasby's claim now rests on different statutory grounds is not sufficient, under Pennsylvania law, to be considered a different cause of action. This court is persuaded that plaintiff had but one cause of action for employment discrimination, 'even if different forms of relief were available and varying theories of constitutional and statutory violations potentially were applicable.' "

Id. (quoting *Gregory v. Chehi*, 843 F.2d 111, 119 (3d Cir. 1988)). Therefore, the court concluded that "Penn-

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[3] The District Court had initially denied Crown Cork's motion for summary judgment on grounds of claim preclusion, and had entered partial summary judgment in favor of McNasby on the ground of issue preclusion. See App. 10a. Crown Cork filed a second motion for summary judgment after the decision in *Gregory v. Chehi*, 843 F.2d 111 (3d Cir. 1988), which held that "litigation of a federal claim can be barred by prior litigation of a state claim based on the same transaction even if 'the relief obtainable in the two forums varies to some degree.' " App. 11a (quoting *Gregory*, 843 F.2d at 118).

sylvania law would preclude relitigation of the plaintiffs' claims in Pennsylvania state court." *Id.* 36a-37a.

4. *The Court of Appeals' decision.* The Court of Appeals reversed. In spite of the Pennsylvania preclusion statute and its similarity to the New York statute involved in *Kremer*, see n.6 *infra*, the court created an exception to the plain language of the statute and held that McNasby's Title VII claim was not precluded under § 962(b). The court relied on dictum in an intermediate state court decision that did not address the preclusion question presented in this case. *See Lukus v. Westinghouse Electric Corp.*, 276 Pa. Super. 232, 419 A.2d 431 (1980) (*en banc*) (holding that a prior Title VII action in federal court does not bar a proceeding in the PHRC, and stating in dictum that § 962(b) does not concern federal law). The Court of Appeals acknowledged that "the issue is extremely close," App. 23a, and that "were it not for *Lukus*, we might well conclude that Pennsylvania would read the 'any other action . . . based on the same grievance' language of section 962(b) as a bar to subsequent federal claims." *Id.* 24a. Nevertheless, the court discarded the Pennsylvania statute by holding that it refers only to state-law claims and therefore "is simply irrelevant to this case and thus has no effect on McNasby's ability to pursue her federal claims." *Id.* 26a-27a.

With respect to Pennsylvania common law, the Court of Appeals purported to find a rule of "jurisdictional competency" and extended it to the jurisdiction of state courts exercising appellate jurisdiction to review administrative proceedings. Although the Pennsylvania courts regarded themselves, at the time of McNasby's state court proceedings, as open and competent to adjudicate Title VII claims,[4] the Court of Appeals held that preclusion

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[4] See *Chmill v. City of Pittsburgh*, 488 Pa. 470, 412 A.2d 860 (1980). The Third Circuit later ruled, in *Bradshaw v. General Motors Corp.*, 805 F.2d 110 (3d Cir. 1986), that Title VII claims are

would not apply on the ground that the courts that exercised appellate jurisdiction over the appeals from the PHRC—the Commonwealth Court and the Pennsylvania Supreme Court—did not have *original* jurisdiction to entertain Title VII claims. See App. 16a.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' DECISION CONFLICTS WITH THIS COURT'S DECISION IN *KREMER* AND DENIES TO PENNSYLVANIA STATE COURT PROCEEDINGS THE FULL FAITH AND CREDIT TO WHICH THEY ARE ENTITLED UNDER 28 U.S.C. § 1738.

In *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982), this Court held that a New York preclusion statute was binding on the federal courts in a Title VII action, with the result that a state court decision upholding a state administrative agency's rejection of an employment discrimination claim was entitled to preclusive effect in a subsequent Title VII action in federal court. The Court reached this decision in several steps. First, it emphasized that the federal full faith and credit statute, 28 U.S.C. § 1738, "requires federal courts to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the State from which the judgments emerged." 456 U.S. at 466 (footnote omitted).[5]

Second, the Court noted that the Appellate Division of the New York Supreme Court had "issued a judgment

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within the exclusive jurisdiction of the federal courts. That issue is now before this Court in *Yellow Freight System, Inc. v. Donnelly*, No. 89-431. See 110 S.Ct. 363 (1989), *granting cert. to Donnelly v. Yellow Freight System, Inc.*, 874 F.2d 402 (7th Cir. 1989).

[5] In deciding *Kremer* this Court found it unnecessary to determine whether the case involved claim or issue preclusion. In later cases the Court has made clear that § 1738 requires federal courts to follow the full scope of state preclusion law. See, *e.g.*, *Migra v. Warren City School District Bd. of Educ.*, 465 U.S. 75, 81 (1984).

affirming the decision of the [New York State Division of Human Rights] Appeals Board that the discharge and failure to rehire Kremer were not the product of the discrimination that he had alleged." *Id.* The Court observed that "[t]here is no question that this judicial determination precludes Kremer from bringing 'any other action, civil or criminal, based upon the same grievance' in the New York courts." *Id.* at 466-67 (quoting N.Y. Exec. Law § 300 (McKinney 1972)). "By its terms, therefore, § 1738 would appear to preclude Kremer from relitigating the same question in federal court." *Id.* at 467.

The Third Circuit's decision in the instant case constitutes an evasion of *Kremer* and of § 1738 in two respects. First, it interprets the Pennsylvania preclusion statute, which is virtually identical to the New York statute involved in *Kremer*, as *not* barring a subsequent Title VII action in federal court, in spite of *Kremer*'s clear holding to the contrary. Second, through distortions of both state statutory and common law, the decision violates the general mandate of *Kremer* and § 1738 requiring the federal courts to honor state law that would preclude a subsequent action based on a previously litigated grievance.

A. The Court of Appeals' Interpretation of § 962(b) of the PHRA Is an Evasion of *Kremer* and § 1738.

Section 962(b) is virtually identical to § 300 of the New York Executive Law involved in *Kremer*.[6] Although

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[6] The respective statutory provisions provide as follows:

Pa. § 962(b)	*N.Y. § 300*
"[N]othing contained in this act shall be deemed to repeal or supersede any of the provisions of any existing or hereafter adopted municipal ordinance, municipal charter or of any law	"Nothing contained in this article shall be deemed to repeal any of the provisions of the civil rights law or of any other law of this state relating to discrimination because of race, creed, color

the Court of Appeals correctly noted its obligation to apply the law of Pennsylvania, and although it is conceivable that virtually identical statutory language might be construed differently by the courts of different States, one would expect similar statutes to have similar meanings, absent clear evidence to the contrary. This is particularly true in the context of state employment discrimination statutes, which bear marked similarities from State to State and which often are copied from one State to another. Indeed, the New York statute served as a model for many other state laws. See *Kremer*, 456 U.S. at 473 n.13 (noting that the pioneering New York law had been copied in 22 States).[7]

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of this Commonwealth relating to discrimination because of race, color, religious creed, ancestry, age, sex, national origin, or handicap or disability, but *as to any acts declared unlawful* by section five of this act *the procedure herein provided shall, when invoked, be exclusive and the final determination therein shall exclude any other action, civil or criminal, based on the same grievance of the complainant concerned.* If the complainant institutes any action based on such grievance without resorting to the procedure provided in this act, such complainant may not subsequently resort to the procedure herein." (Emphasis added.)

or national origin; but, *as to acts declared unlawful* by [§ 296] of this article, *the procedure herein provided shall, while pending, be exclusive; and the final determination therein shall exclude any other action, civil or criminal, based on the same grievance of the individual concerned.* If such individual institutes any action based on such grievance without resorting to the procedure provided in this article, he may not subsequently resort to the procedure herein." (Emphasis added.)

[7] In addition to Pennsylvania, at least eight States and the District of Columbia have preclusion statutes substantially the same as New York's § 300. See Conn. Gen. Stat. § 46a-95(i) (1989); Ky. Rev. Stat. § 344.270 (1984); Mass. Gen. Laws Ann. ch. 151B, § 9 (West 1986); Minn. Stat. § 363.11 (1989); N.H. Rev. Stat. Ann. § 354-A:13 (1986); N.J. Rev. Stat. § 10:5-27 (1985); Ohio Rev. Code Ann. § 4112.08 (Page 1979); W. Va. Code § 5-11-13 (1989); and D.C. Code Ann. § 1-2556 (1985).

The Court of Appeals' construction of § 962(b) as not precluding a subsequent Title VII action, in the face of this Court's clear contrary construction of the virtually identical New York statute, warrants review by this Court. The lower federal courts should not be permitted to evade state law, and the interests in repose and judicial economy served thereby, in the guise of applying it.[8] The issue is not limited to Pennsylvania, moreover, in light of the fact that similar preclusion statutes exist in a number of other States and the District of Columbia. See n. 7, *supra*.

Apart from this Court's contrary construction of a virtually identical statute, the Court of Appeals' refusal to apply the plain language of § 962(b) violates § 1738. Section 962(b) reads in relevant part:

> "[A]s to any acts declared unlawful by section five of this act the procedure herein provided shall, when invoked, be exclusive and the final determination therein shall exclude any other action, civil or crim-

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[8] While this Court will ordinarily defer to a federal court of appeals when the issue is the proper construction of state law, such deference is not warranted in this case. First, the Court of Appeals' interpretation of § 962(b) (and Pennsylvania's common law of preclusion) is contrary to the interpretation of the District Court in this case, which is even closer than the Court of Appeals to matters of state law.

Second, this Court has closely scrutinized one court's interpretation of another jurisdiction's preclusion law when that law is to furnish the basis for decision under the principle of full faith and credit. See, *e.g.*, *Titus v. Wallick*, 306 U.S. 282, 287-88 (1939); *Adam v. Saenger*, 303 U.S. 59, 64 (1938). In each case, this Court made clear that the issue was one of federal law, reviewable as such by this Court.

Indeed, this Court has not deferred to lower federal courts' interpretations even of purely state-law issues, if those interpretations appeared to be "clearly erroneous" or "unreasonable." See, *e.g.*, *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 500 (1985); *United States v. Durham Lumber Co.*, 363 U.S. 522, 527 (1960).

> inal, based on the same grievance of the complainant concerned."

"Action" is defined by statute as "any proceeding in any court of this Commonwealth," "unless the context clearly indicates otherwise." 1 Pa. Cons. Stat. Ann. § 1991. Thus, the plain language of § 962(b) directs that once the provisions of the PHRA are invoked, the complaining party is barred from bringing any other lawsuit "based on the same grievance" in Pennsylvania state court. When read with § 1991, the plain language of § 962(b) would bar a subsequent Title VII claim (or any other federal claim) "based on the same grievance" brought in state court. Because "[s]ection 1738 requires federal courts to give the same preclusive effect to state court judgments that those judgments would be given *in the courts of the State from which the judgment emerged*," *Kremer*, 456 U.S. at 466 (emphasis added), a Title VII claim brought in federal court would similarly be barred under the dictates of § 1738.

Section 962(b) is designed to promote the efficiency and expertise of the PHRC by ensuring the exclusivity of PHRC remedies and procedures. The Court of Appeals distorted the Pennsylvania statute by carving out an exception to the unequivocal language of § 962(b). The court did so by declaring an "intent" on the part of the Pennsylvania legislature to exempt state court actions arising under *federal law* from the preclusion required by § 962(b). The court manufactured this "intent" by misinterpreting dictum in a Pennsylvania intermediate court decision, *Lukus v. Westinghouse Electric Corp.*, 276 Pa. Super. 232, 419 A.2d 431 (1980) (*en banc*), and then misapplying that dictum.[9]

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[9] Even if the Court of Appeals were correct that the language of § 962(b) is "not unambiguous," App. 25a, then under Pennsylvania law, the word "action" must be given its meaning as provided in the statute—that is, *any* suit brought in state court—since the definition shall be applied "unless the context *clearly* indicates otherwise." 1 Pa. Cons. Stat. Ann. § 1991 (emphasis added).

The Court of Appeals made much of the fact that § 962(b) does not refer to federal law and that the term "action" does not include federal court proceedings. States are without power, however, to preempt federal law, which explains the absence of any reference to it in the first sentence. Moreover, it would be highly unusual for a state legislature to refer to federal law or to federal court proceedings in a statute dealing with election of remedies and preclusion in state administrative and judicial proceedings. Federal proceedings are not "actions" within the meaning of either sentence of § 962(b). It is § 1738, not § 962(b), which requires that subsequent claims in federal court be treated the same as they would be treated if brought in a subsequent state-court action. See *Al-Khazraji v. Saint Francis College*, 784 F.2d 505 (3d Cir. 1986), *aff'd*, 481 U.S. 604 (1986).

Thus, while the preclusion provision of § 962(b) prevents a subsequent action in state court, its preclusive effect is not limited to actions based on state law. The public policy underlying the preclusion rule—the conservation of state resources by requiring a claimant to proceed in only one state forum—is the same whether the second state action raises state or federal claims.[10] There is no reason to believe that Pennsylvania would prohibit duplicative employment discrimination litigation in its courts if the second action was based on Pennsylvania law but would permit such duplicative litigation in its own courts as long as the subsequent claim was based on Title VII or other federal law.[11]

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[10] This public policy was not at issue in *Lukus*, because the claimant there had not utilized any state resources, but instead had proceeded initially in federal court.

[11] The Court of Appeals rejected Crown Cork's argument on this point by stating that it "simply [did] not agree . . . that it is unbelievable that a state would elect to give a litigant her choice of

The Court of Appeals' creation of a legislative intent not to preclude federal claims brought in a second state court action, despite the plain language of the state statute, is so aberrant as to constitute a denial of full faith and credit.[12]

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one state remedy as well as allowing her to pursue a Title VII claim separately." App. 26a.

However, imputing such an intention to the Pennsylvania legislature makes sense only if one assumes that the legislature intended the burden of the duplicative litigation to fall on the federal rather than state courts. Otherwise, duplicative litigation would occur in the state courts and § 962(b) would fail to have its intended effect—preventing multiple proceedings arising from the same allegedly discriminatory conduct.

Such a legislative purpose would, however, be impermissible. This Court has long recognized that the state legislatures may not presume to establish the interjurisdictional effect of state court judgments. To allow the States to determine the effect that state court judgments will have in forums outside the State "represents an unwarranted delegation to the States of this Court's responsibility for the final arbitration of full faith and credit questions." *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 271 (1980) (plurality opinion). See also Reese & Johnson, *The Scope of Full Faith and Credit to Judgments*, 49 Colum. L. Rev. 153, 161-62 (1949).

[12] Members of this Court have expressed with increasing frequency their concerns about judicial interpretation of statutes based on legislative intent when the language of the statute is clear. See, *e.g.*, *United States v. Monsanto*, 109 S.Ct. 2657 (1989); *Public Citizen v. United States Department of Justice*, 109 S.Ct. 2558, 2573-76 (1989) (Kennedy, J., concurring); *United States v. Taylor*, 108 S.Ct. 2413, 2423-24 (Scalia, J., concurring). As Justice Kennedy stated in *Public Citizen*: "Reluctance to working with the basic meaning of words in a normal manner undermines the legal process." 109 S.Ct. at 2574.

Monsanto, *Public Citizen* and *Taylor* all involved the interpretation of federal statutes. The instant case illustrates the even greater need for this Court to clarify that the lower federal courts should not depart from the plain language of state statutes, where there are not only the concerns expressed in *Monsanto* about separation of powers, but also concerns about federal/state comity. This concern is even greater where, as here, a state statute provides clear rules of statutory construction. See n.9, *supra*.

B. The Court of Appeals Did Not Apply Pennsylvania Common Law of Preclusion, in Violation of § 1738.

While purporting to apply Pennsylvania common law rules of preclusion, the Court of Appeals actually so far departed from those rules as not to have applied them at all. A federal court does not comply with § 1738 and the decisions of this Court simply by saying that it is applying state law, if its interpretation of state law constitutes independent lawmaking rather than the faithful application of state law.[13]

The Court of Appeals held that because McNasby chose to proceed before the PHRC, which purportedly did not have original jurisdiction over a Title VII claim, and appealed to courts of limited jurisdiction, she would not have been foreclosed by Pennsylvania common law from bringing a second action in state court. The court's opinion misinterprets the state common law of preclusion, first by manufacturing an exception to claim preclusion not recognized in Pennsylvania law, and second by extending the supposed exception to the administrative context in a manner clearly contrary to Pennsylvania decisions. The court's opinion encourages plaintiffs initially to shop for the most restrictive forum available in order to preserve a second chance to litigate the same claim. The effect of the decision below will be to burden not only defendants, but also the state and federal courts.

The Court of Appeals relied on *McCarter v. Mitcham*, 883 F.2d 196 (3d Cir. 1989), in which it had invented a jurisdictional competency exception to Pennsylvania claim

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[13] Before *Kremer*, the Third Circuit had demonstrated an unwillingness to bar Title VII actions based on prior state-court judgments reviewing state agency determinations. See *Smouse v. General Electric Co.*, 626 F.2d 333 (3d Cir. 1980) (*per curiam*). In *Kremer*, this Court specifically disapproved the *Smouse* decision. See 456 U.S. at 466 n.5. The decision below illustrates the Third Circuit's continued reluctance, even after *Kremer*, to honor state law of preclusion.

preclusion law. See App. 17a.18a.[14] Having erred in *McCarter*, the court below compounded that error in this case by extending the exception to appellate review of state administrative proceedings.

In its previous decisions in *Davis v. United States Steel Supply*, 688 F.2d 166 (3d Cir. 1982), and *Gregory v. Chehi*, 843 F.2d 111 (3d Cir. 1988), however, the Court of Appeals had held that state court judgments reviewing administrative agency decisions precluded civil rights plaintiffs from subsequently bringing their claims in federal court. These cases cannot be distinguished. The only distinction drawn by the Third Circuit in this case was that the *Davis* and *Gregory* agency decisions were reviewed by the Court of Common Pleas, a court of unlimited original jurisdiction. The court's analysis is faulty for several reasons. First, since court review is not necessary for preclusion under state law, this distinction is irrelevant. Second, the original jurisdiction of the Court of Common Pleas was not invoked by either Davis or Gregory, and the appellate jurisdiction was no different in those cases from the Commonwealth Court's appellate jurisdiction here.[15] Third, the court ignored alternative actions McNasby could have pursued, but

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[14] *McCarter* relied on *City of Philadelphia v. Stradford Arms, Inc.*, 1 Pa. Commw. 190, 274 A.2d 277 (1971), which was strictly an *issue* preclusion case. Moreover, *Stradford Arms* did not create any such exception even for issue preclusion. See *Frederick v. American Hardware Supply Co.*, 557 A.2d 779, 780-81 (Pa. Super. 1989).

[15] Neither Gregory nor Davis had advanced any federal claim in their agency proceedings, nor could they have. The Local Agency Law prevented Davis and Gregory from raising their federal claims on appeal to the Court of Common Pleas. 2 Pa. Cons. Stat. Ann. § 753(a) (Purdon Supp. 1989). The scope of appellate review under the Police Tenure Act, under which Gregory also proceeded, is identical to that under the Local Agency Law. *Lower Providence Township v. Nagle*, 79 Pa. Commw. 322, 327-31, 469 A.2d 338, 341-43 (1984). The scope of review in this case was the same. See 2 Pa. Cons. Stat. Ann. § 703(a) (Purdon Supp. 1989).

chose not to—actions that would have allowed her to bring her Title VII claims in a state court having original jurisdiction over those claims.[16]

The court below relied on § 26(1(c) of the *Restatement (Second) of Judgments* (1982), and particularly illustration 2, in trying to create a distinction between this case and *Gregory*. App. 18a. Even if Pennsylvania were to adopt § 26(1)(c), it is simply inapposite here. Section 26(1)(c) would apply only if the Pennsylvania state courts believed that the federal courts had exclusive jurisdiction over Title VII claims. Because Pennsylvania courts believed they had jurisdiction over Title VII claims, it does not matter that McNasby brought her claim in a more limited forum. As long as there was a court available to her in the same system of courts where the entire claim could have been heard, "[t]he plaintiff, having voluntarily brought [her] action in a court which can grant [her] only limited relief, cannot insist upon maintaining another action on the claim." *Restatement (Second) of Judgments* § 24, comment g. *Cf. Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 294-95 (Rehnquist, J., dissenting) (preclusion should apply to judgment from court of limited jurisdiction when litigant voluntarily chose that forum).

C. The Result of the Court of Appeals' Decision Is to Impose a Significant Burden on the Federal Courts.

Since, as we have shown, the Pennsylvania courts would regard any subsequent action by respondents as barred if such a suit were actually brought in the Penn-

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[16] In 1974, the PHRA was amended to permit complainants to sue in state court after the expiration of one year from the filing of a PHRC complaint. See 43 Pa. Cons. Stat. Ann. § 962(c) (Purdon Supp. 1989). Therefore, McNasby could have filed a suit in the Court of Common Pleas, a court of unlimited original jurisdiction, alleging state and federal causes of action. McNasby is no different from Gregory or Davis, both of whom had the opportunity to raise their federal claims in state court but chose not to.

sylvania courts, the result of the Court of Appeals' decision is to impose an enormous burden of duplicative litigation solely on the federal courts.

The Court of Appeals' distortion of state law to achieve this objectionable result should be corrected by this Court, especially because it is unlikely that the state courts will have the opportunity to correct the misinterpretation of state law, and the burden of the error will fall exclusively on the federal courts. The decision below provides an additional incentive to litigants with federal claims (whether Title VII or other statutory claims) to pursue them only in federal court. It therefore is important for this Court to review the Third Circuit's decision in this case to make sure that the federal courts are not burdened with duplicative litigation.

II. REVIEW SHOULD BE GRANTED TO CONSIDER WHETHER AND IN WHAT CIRCUMSTANCES § 1738 AND TITLE VII REQUIRE OR PERMIT A FEDERAL COURT TO CONSIDER FEDERAL INTERESTS IN DETERMINING THE PRECLUSIVE EFFECT OF STATE JUDGMENTS.

Recent decisions of this Court assume that § 1738 cannot be read to permit a federal court to accord greater preclusive effect to state proceedings than would a court of that state, absent an express or implied repeal of § 1738. See *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 383 (1985); *Migra v. Warren City School District Board of Education*, 465 U.S. 75, 88 (1984) (White, J. concurring). Compare *Haring v. Prosise*, 462 U.S. 306, 313 n.6 (1983) with *id.* at 317-19.

This construction has been called "unfortunate." *Migra*, 465 U.S. at 88 (White, J. concurring).[17] This

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[17] Justice White, in his concurrence joined by two other Justices, explained:

> "In terms of the purpose of [§ 1738], which is to require federal courts to give effect to state-court judgments, there is no

case provides an appropriate vehicle for the Court to consider the issue of greater preclusive effect. Even if the Court were to conclude that the full faith and credit statute usually requires strict adherence to state preclusion law, it might well find in this case a basis for two exceptions to the normal rule: (1) where application of the preclusion law of the rendering state would frustrate an important federal statutory policy, whether or not the statute expressly or impliedly repealed § 1738; or (2) where the preclusion law of the rendering State is aberrant, serves no discernible domestic policy, or is indeterminate.

A. This Court Should Consider Whether Title VII Requires or Permits a Federal Court to Dismiss a Title VII Action Where Functionally Identical Claims Have Been Litigated in State Administrative and Judicial Proceedings.

In *Kremer v. Chemical Construction Corp.*, *supra*, this Court held that Title VII did not impliedly repeal § 1738 so as to allow a federal court to give less preclusive effect to a state court judgment than the rendering State would have given it. Not at issue in *Kremer*, and left unaddressed, was whether Title VII impliedly repealed § 1738 so as to allow a federal court to give greater preclusive effect to a state court judgment than it would be given by the courts in the rendering State.

The legislative history of Title VII and the structure of Title VII enforcement fully support a requirement that federal courts give preclusive effect to state court

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reason to hold that a federal court may not give preclusive effect to a state judgment simply because the judgment would not bar relitigation in the state courts. If the federal courts have developed rules of res judicata and collateral estoppel that prevent relitigation in circumstances that would not be preclusive in state courts, the federal courts should be free to apply them, the parties then being free to relitigate in the state courts."

Id.

judgments in employment discrimination cases, even if the state courts would not do so. Indeed, this Court has already stated that "the legislators [who adopted Title VII] did not envision full litigation of a single [discrimination] claim in both state and federal forums." *Kremer*, 456 U.S. at 474 (footnote omitted).[18]

The entire Title VII scheme of enforcement indicates that Congress did not intend to allow a discrimination plaintiff to litigate to a conclusion in both state and federal courts. This Court has recognized that the deferral provisions of Title VII were designed to give the States "an opportunity to redress the evil at which the federal legislation was aimed, and to avoid federal intervention unless its need was demonstrated." *Mohasco Corp. v. Silver*, 447 U.S. 807, 821 (1980) (footnote omitted). See also *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 755 (1979) (deferral provisions "give state agencies a limited opportunity to resolve problems of employment discrimination and thereby to make unnecessary, resort to federal relief by victims of discrimination"). If Congress

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[18] Thus, this Court noted that Senator Dirksen, the principal drafter of the Senate bill during the original enactment of Title VII, "stated in no uncertain terms his desire to avoid multiple suits arising out of the same discrimination." *Kremer*, 456 U.S. at 474 n.14. Similarly, in debating the 1972 amendments to Title VII, Senator Javits (a manager and co-sponsor of the 1972 bill) argued that "the doctrine of res judicata would prevent repetitive litigation against a single defendant . . . ." *Id.* at 475.

> "[O]nce there is a litigation—a litigation started by the Commission, a litigation started by the Attorney General, or a litigation started by the individual—the remedy has been chosen and can be followed through and no relitigation of the same issues in a different forum would be permitted."

Id. (citing 118 Cong. Rec. at 3370 (1972)). This Court has also looked to the views of Senator Williams, another co-sponsor, who stated: "I do not believe that the individual claimant should be allowed to litigate his claim to completion in one forum, and then if dissatisfied, go to another forum to try again." 456 U.S. at 476 (citing 118 Cong. Rec. at 3372).

meant to avoid duplicative administrative proceedings, certainly it was at least as concerned about the duplicative use of judicial resources. As this Court noted, in rejecting Kremer's argument that barring federal actions based on judicially reviewed administrative determinations would lead to a deterioration in the quality of the state administrative process, "stripping state court judgments of finality would be far more destructive to the quality of adjudication by lessening the incentive for full participation by the parties and for searching review by state officials . . . . [and] would reduce the incentive for States to work towards effective and meaningful antidiscrimination systems." 456 U.S. at 478 (citation and footnote omitted).[19]

B. This Court Should Consider Whether § 1738 and Title VII Require or Permit a Rule of Greater Preclusive Effect When The Preclusion Law of the Rendering State Is Aberrant, Serves No Discernible Domestic Policy, or Is Indeterminate.

We have demonstrated both that the Court of Appeals' interpretations of Pennsylvania law are aberrant and that its construction of Pennsylvania law serves no discernible domestic policy. Section 1738 should not be read to require the courts of other jurisdictions to pay the costs of duplicative litigation in such circumstances.

Furthermore, although this Court has held that § 1738 normally directs a federal court to treat a subsequent action as barred by a state court judgment only if

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[19] A rule of full preclusion would also foster judicial economy and efficiency. Instead of having to delve into the intricacies of inconsistent and confusing state preclusion law, the federal court would simply consider whether the state court proceedings fulfilled the dictates of due process within the context of an adequate discrimination law. This rule would be simply applied and would result in greater uniformity of decision than that created by a State-by-State review of preclusion law, with all the opportunities for distortion and evasion such review permits.

that is what the state court would do, neither the statute nor this Court have given clear direction to the lower federal courts about what to do when state law is unclear. The closest that this Court has come to providing such guidance was in *Marrese*. There the Court acknowledged that there could be no precise state law on the preclusion question presented, since the second action, brought in federal court, involved federal antitrust claims within the exclusive jurisdiction of the federal courts. See 470 U.S. at 381-82. This Court nevertheless rejected the Seventh Circuit's decision to look to the federal common law of preclusion in order to determine the preclusive effect of a state court judgment "without regard to the law of the State in which judgment was rendered." *Id.* at 380. Rather, the Court indicated that the federal court may "rely in the first instance on state preclusion principles . . . ." *Id.* at 382.

This case illustrates the quagmire into which litigants and the federal courts are drawn by trying to determine "state preclusion principles" when those principles are not clearly articulated or fully developed. As former Chief Justice Burger noted in his concurring opinion in *Marrese*,

> "[i]f state law is simply indeterminate, the concerns of comity and federalism underlying § 1738 do not come into play. At the same time, the federal courts have direct interests in ensuring that their resources are used efficiently and not as a means of harassing defendants with repetitive lawsuits, as well as in ensuring that parties asserting federal rights have an adequate opportunity to litigate those rights."

470 U.S. at 390 (Burger, C.J., concurring). The former Chief Justice therefore suggested that "a strong argument could be made that a federal rule would be more appropriate than a creative interpretation of ambiguous state law." *Id.* This is particularly true when the "[i]nterest of the federal enforcement forum in having a

rule of greater preclusion applied exists to the extent that federal procedural policies are implicated." Shreve, *Preclusion and Federal Choice of Law*, 64 Tex. L. Rev. 1209, 1255-56 (1986).

Here, such an interest exists in the form of Title VII's procedural scheme, which implicates a federal procedural policy of giving deference to state administrative action that has been reviewed by the state courts. A rule of greater preclusive effect also would promote the substantive interests of certainty and reliance and would reduce the waste of protracted litigation—like this—to determine " 'the preclusive effects of the first effort.' " *Marrese*, 470 U.S. at 390 (Burger, C.J., concurring) (quoting 18 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 4407, at 49 (1981)).

In addition, there is a federal interest in the uniform treatment of Title VII claims asserted by residents of different States. See Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 Cornell L. Rev. 733, 813-28 (1986). If the Court of Appeals' decision in this case remains standing, a New York resident who previously litigated a state discrimination claim will not be allowed to bring a subsequent Title VII action, whereas a Pennsylvania resident will—even though the two States have virtually identical preclusion statutes. Allowing the federal courts to give preclusive effect to all state court judgments involving anti-discrimination laws, even when the State itself would not do so, would serve the strong federal interest in the uniform administration of Title VII. Accordingly, the Court should grant review to consider whether the federal courts should develop a rule of greater preclusion in cases like this if state law does not serve a legitimate purpose in its interjurisdictional application or does not provide a determinative answer on the preclusion issue.

III. AS INTERPRETED BY THE COURT OF APPEALS, § 962(b) VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.[20]

Section 962(b), as interpreted by the Third Circuit, provides that resort to the PHRA procedures precludes a litigant from later suing on the same grievance under state law, but does not preclude a litigant from later suing on the same grievance under Title VII or other federal statutes (*e.g.*, 42 U.S.C. § 1983). Section 962(b) thus creates two classes of litigants. The first class consists of litigants who have defended a proceeding brought under the PHRA and who face a subsequent claim based on the same grievance brought under state law; the second class consists of litigants who have defended a proceeding under the PHRA and who face a functionally identical claim based on the same grievance brought under Title VII or other federal statutes. Litigants in the first class are spared the costs of duplicative litigation; litigants in the second class are not.

This classification denies Crown Cork the equal protection of the laws, since it fails rationally to advance "a reasonable and identifiable governmental objective." *Schweiker v. Wilson*, 450 U.S. 221, 235 (1981). The main goal of § 962(b)'s preclusion provision is the avoidance of duplicative proceedings in Pennsylvania tribunals based on the same employment discrimination grievance. The distinction between subsequent federal claims, which supposedly are not precluded by proceedings under the PHRA, and functionally identical claims based on state law, which are precluded, does not, however, rationally advance this goal. From the perspective of the defendant and the state courts, the two situations cannot be distinguished. *Cf. In re Asbestos Litigation*, 829 F.2d

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[20] Section 2403(b) of Title 28 of the United States Code may be applicable. Crown Cork does not challenge the constitutionality of § 962(b) if interpreted as Crown Cork urges, but contends that the statute is unconstitutional as construed by the Court of Appeals.

1233, 1238-39 (3d Cir. 1987) (scheme that treated classes of civil defendants differently subject to rational basis scrutiny under Equal Protection Clause).

Assuming that the courts of Pennsylvania possess concurrent jurisdiction over Title VII claims, and with respect to federal statutes unquestionably subject to state court jurisdiction, the creation of an exception from the preclusion provision for subsequent federal claims frustrates, rather than advances, the goal of avoiding duplicative proceedings in the Pennsylvania tribunals. Thus, the classification fails to meet the rational basis test, because it is arbitrary and does not further the objective of the statute.[21]

Accordingly, this Court should grant review either to determine if the statute can be construed in a manner that would not raise constitutional problems, see generally *Frisby v. Schultz*, 108 S.Ct. 2495, 2501 (1988) (and cases cited therein), or to consider the constitutionality of the statute as construed by the Third Circuit.

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[21] See, *e.g.*, *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 447-50 (1985); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 620-22 (1985); *Williams v. Vermont*, 472 U.S. 14, 21-27 (1985); *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 876-82 (1985); *Zobel v. Williams*, 457 U.S. 55, 61-64 (1982); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 438-42 (1982) (separate opinion of Blackmun, J.), 443-44 (Powell, J., concurring in the judgment).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 6, 1990

APPENDIX

APPENDIX

Filed: October 11, 1989

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-1893

ELIZABETH MCNASBY, CATHERINE BERES, HENRIETTA ELLIOTT, MARGARET FELMEY, ANN JACYSZYN, VIRGINIA KNOWLES, LORRAINE MASON, EDITH MCGRODY, BETTY (PONATH) MOYER, JOAN MURPHY, ELEANOR NEYER, MARIE PEKLA, and DORIS YOCUM, on behalf of themselves and all others similarly situated,

Appellants

vs.

CROWN CORK AND SEAL CO., INC. and SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, AFL-CIO, a/k/a SHEET METAL PRODUCTION WORKERS' UNION, LOCAL 266,

Appellees

On Appeal From the United States District
Court For the Eastern District
of Pennsylvania
(D.C. Civ. No. 82-4258)

Argued: May 22, 1989

Before: BECKER, STAPLETON and
ROSENN, *Circuit Judges*

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OPINION OF THE COURT

BECKER, *Circuit Judge.*

This protracted employment discrimination case presents several intricate and difficult questions concerning the law of claim preclusion as applied by the federal courts under the full faith and credit statute, 28 U.S.C. § 1738 (1982). At bottom, we must decide whether a decision of the state's highest court affirming a state agency's finding of sex discrimination and the agency's award of limited damages to a group of plaintiffs precludes, by reason of common law or statute, the efforts of those plaintiffs and a class of fellow employees to proceed in federal court under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1 to 2000e-17, to recover make-whole damages that were not provided by the agency's remedy. The district court held that the plaintiffs were precluded on both common law and statutory grounds and granted summary judgment in favor of defendants Crown Cork and Seal Co. ("Crown Cork") and Sheet Metal Production Workers Union, Local 266 (the "Union").

The plaintiffs raise a plethora of issues on appeal. They contend that the district court erred in holding the

suit precluded because: (1) the state statute on which the district court relied only bars subsequent litigation of claims arising under state and municipal laws, not claims based on federal law; (2) common law preclusion is inappropriate because Title VII is a matter of exclusive federal jurisdiction and Pennsylvania would not preclude the litigation of claims over which the initial court lacked jurisdiction; (3) common law preclusion is inappropriate because the plaintiffs did not have the same quality or capacity in the state proceeding that they have here because of their inability to direct the agency proceedings; and (4) plaintiffs' due process rights are denied if their suit is precluded because they did not have a full and fair opportunity to litigate their claims in the state proceedings. Plaintiffs also submit that even if the lead plaintiff, Elizabeth McNasby, is precluded, the intervening plaintiffs and class members are entitled to proceed despite the fact that McNasby was the only plaintiff to file a charge with the United States Equal Employment Opportunity Commission ("EEOC"). Finally, plaintiffs contend that Title VII authorizes the federal courts to give relief supplementary to that provided for by the state, and that, to this extent, Title VII partially repeals section 1738. The defendants counter each of these arguments.

In determining the preclusive effect of a state court judgment, we apply the rendering state's law of res judicata. *See Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985). We conclude that Pennsylvania common law would not preclude any of the plaintiffs from pursuing their Title VII claims. Pennsylvania common law does not preclude a litigant from litigating in a second action a claim that could not have been raised in the first action because it was not within the jurisdiction of the first court. *See McCarter v. Mitcham*, No. 88-3654, slip op. at 7 (3d Cir. Aug. 16, 1989). Moreover, regardless of whether Title VII jurisdiction is exclusively federal, the plaintiffs never

proceeded in a Pennsylvania court that could have asserted jurisdiction over a Title VII claim; rather, the plaintiffs proceeded directly from the state agency to the Commonwealth Court, a court of very limited original jurisdiction.

Furthermore, although it is a close issue, we agree with the plaintiffs that the district court erred in its interpretation of the Pennsylvania preclusion statute. We believe that the Pennsylvania Supreme Court would follow the decision of the *en banc* Pennsylvania Superior Court which held that the relevant Pennsylvania statute, 42 Pa. Cons. Stat. Ann. § 962(b) (Purdon Supp. 1989), concerns only the necessity of bringing all state and municipal discrimination claims in a single suit and hence does not speak to the relationship between state and federal discrimination laws. *See Lukus v. Westinghouse Electric Corp.*, 276 Pa. Super. 232, 268-69, 419 A.2d 431, 450-51 (1981) (en banc). We thus find no statutory preclusion.

Consequently, we believe that Pennsylvania law does not preclude the plaintiffs' Title VII suit, and that they should be allowed to proceed in the district court. We will therefore vacate the judgment of the district court and remand for further proceedings.[1]

I. HISTORY OF THE CASE

A. *The State Agency Proceedings*

In February 1970, eleven female employees of Crown Cork, including McNasby, visited the Pennsylvania Human Rights Commission ("PHRC"), and alleged that Crown Cork, in concert with the Union, had engaged in

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[1] In light of our conclusion that plaintiffs may proceed, we need not reach plaintiffs' contentions that they served in a different capacity in the state proceedings, that they did not have a full and fair opportunity to litigate in the state action, that the other plaintiffs may proceed even if the lead plaintiff may not, and that Title VII impliedly partially repeals section 1738.

a practice of discriminating against female employees with respect to the terms and conditions of their employment. In December 1970, the PHRC filed a "Commissioner's Complaint" against Crown Cork and the Union, alleging in general terms that they had violated the Pennsylvania Human Relations Act ("PHRA"), 43 Pa. Cons. Stat. Ann. §§ 951-63 (Purdon 1964 & Supp. 1989), which provides in relevant part as follows:

> It shall be an unlawful discriminatory practice, unless based upon a bona fide occupational qualification . . .
>
> (a) For any employer because of the . . . sex . . . of any individual to . . . discriminate against such individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment, if the individual is the best able and most competent to perform the services required.
>
> . . .
>
> (e) For any . . . labor organization . . . to aid, abet, incite, compel or coerce the doing of any act declared by this section to be ~~an~~ unlawful discriminatory practice . . . or to attempt, directly or indirectly, to commit any act declared by this section to be an unlawful discriminatory practice.

Id. § 955. The Commissioner's Complaint was brought on behalf of all female employees of Crown Cork.

On May 17, 1971, McNasby filed a complaint with the EEOC, based on the same allegedly discriminatory actions by Crown Cork and the Union. In June 1971, McNasby filed a complaint with the PHRC against Crown Cork and the Union, alleging that "the respondents consorted in the lay-off of the complainant because of her sex, FEMALE, and have prevented her, as well as all other females, from enjoying equal job opportunities at Crown Cork and Seal Company." McNasby's PHRC Complaint at 1 (June 11, 1971), J.A. at 60.

In October 1974, while the Commissioner's Complaint and McNasby's complaint were still pending before the PHRC, the Pennsylvania Supreme Court held that a Commissioner's complaint that alleges only general charges of discrimination is invalid under the PHRA. *See PHRC v. United States Steel Corp.*, 458 Pa. 559, 562-64, 325 A.2d 910, 912-13 (1974). Because the Commissioner's Complaint against Crown Cork was similar to the one invalidated in *United States Steel*, the Commissioner filed an extensive amended complaint in October 1975, alleging with particularity the claims of sex discrimination. The amended complaint contained class-wide charges of sex discrimination as well as individual charges on behalf of thirteen women, ten of whom are among the thirteen named plaintiffs in the present action. In accordance with PHRC policies at the time, the investigation and hearing were conducted solely by the PHRC. The two Commissioner's Complaints were joined with McNasby's complaint for purposes of the administrative proceedings.

On August 28, 1981, more than ten years after the initial Commissioner's Complaint was filed, the PHRC issued its opinion, which found that Crown Cork and the Union had discriminated against Crown Cork employees on the basis of sex. In particular, the PHRC found that "at all times since July 9, 1969 [the effective date of the PHRA], Crown has maintained, and the Union has acquiesced in the maintenance of an effectively sex-segregated system of job classification within the bargaining unit represented by Local 266," PHRC Op. at 5 (Aug. 28, 1981), J.A. at 105, and that the women's jobs had paid significantly less than the men's jobs. *Id.* at 20, J.A. at 120. The PHRC further found that "[a]t all times from July 9, 1969 to December 31, 1975, Crown, with the Union's acquiescence, has effectively maintained a sex-segregated system of plant, department, and shift seniority for all of its production and maintenance unit employees," *id.* at 6, J.A. at 106, and that this system

had worked to disadvantage female employees in terms of their transfer, promotion, layoff and recall rights, *see id.* at 6-10, J.A. at 106-10. The PHRC additionally found that "[a]t all times since July 9, 1969 Local 266 has effectively refused to investigate or prosecute the numerous grievances of its female members alleging sex discrimination at Crown." *Id.* at 23, J.A. at 123.

Pursuant to its findings, the PHRC awarded broad injunctive relief, but only limited monetary relief. The PHRC found that there was an "absence of sufficient evidence relating to the period following December 31, 1975," from which damages could be calculated, and thus it awarded no relief to any complainant for post-1975 violations. *Id.* at 56, J.A. 156. The PHRC found that McNasby's 1971 complaint was specific enough to toll the PHRA's ninety-day statute of limitations with respect to McNasby, but that it was not particular enough to toll the statute for the rest of the class. *Id.* at 27, J.A. at 127. It awarded McNasby backpay from the date of her PHRC complaint until the end of 1975. *Id.* at 34, J.A. at 134.

The PHRC also found that the 1970 Commissioner's complaint was too general to toll the statute of limitations for the class and that the 1975 complaint did not relate back to 1970. *Id.* at 26, 27, J.A. at 126, 127. It thus found that all claims of discrimination relating to the period before ninety days prior to the filing of the 1975 complaint (in other words, claims arising prior to July 30, 1975) were barred by the statute of limitations. *Id.* Consequently, those women who had been employed at Crown Cork after July 30, 1975 were awarded backpay only for the period of July 30 through December 31, 1975, and those women who did not work for Crown Cork after July 30, 1975 received nothing. *Id.* at 34, J.A. at 134. The PHRC also declined to hold the Union jointly liable for backpay. *Id.* at 57, J.A. at 157. The PHRC nevertheless noted its view that "although proce-

dural deficiencies in the processing of this matter have precluded a full remedy for all the wrongs found to have been committed, [this case] nevertheless present[s] one of the most blatant patterns of sex discriminatory employment practices that has ever been brought to this Commission's attention." *Id.* at 38, J.A. at 138.

B. *The State Court Proceedings*

The named plaintiffs other than Betty Ponath Moyer retained counsel and filed an appeal with the Pennsylvania Commonwealth Court on October 29, 1981.[2] The plaintiffs also wrote to the PHRC, requesting it to reconsider its determination. *See* Plaintiffs' Letter Br. to PHRC at 1 (March 10, 1982), J.A. at 781. The Commission's staff attorneys also filed a formal motion for reconsideration. On April 28, 1982, the PHRC denied supplementary relief to the complainants. *See* PHRC Op. (April 28, 1982), J.A. at 172-84.

In their action in the Commonwealth Court, the plaintiffs alleged that the statute of limitations had been tolled in 1970; that the PHRC had deprived the plaintiffs of equal protection and due process rights; and that the PHRC had abused its discretion by failing to award class-wide relief for violations that occurred prior to July 30, 1975 or after December 31, 1975 and by failing to hold the Union jointly liable. While that case was pending before that court, McNasby amended her EEOC charge, and, on September 29, 1982, she received a Notice of Right to Sue from the EEOC.[3] She promptly filed this

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[2] The Commonwealth Court has "exclusive jurisdiction of appeals from final orders of . . . Commonwealth agencies," except as otherwise provided. 42 Pa. Cons. Stat. Ann. § 763(a) (Purdon 1981).

[3] If a charge filed with the EEOC is dismissed or if the EEOC has not filed a civil action against the party named in an employment discrimination charge within 180 days after the charge was filed, the EEOC must, if requested, issue a right-to-sue letter to the complainant. The complainant then has ninety days from the

Title VII action in the district court for the Eastern District of Pennsylvania against Crown Cork and the Union, on behalf of a class of female employees and former employees of Crown Cork, based on essentially the same facts as the PHRC action.[4] The case was stayed by agreement of counsel and then placed on the district court civil suspense docket pending the outcome of the state court litigation.

On September 28, 1983, the Commonwealth Court issued its opinion and order, rejecting all of plaintiffs' contentions and affirming the order of the PHRC. *See Murphy v. PHRC*, 77 Pa. Commw. 291, 465 A.2d 740 (1983). Plaintiffs then appealed to the Pennsylvania Supreme Court, which also affirmed. *See Murphy v. PHRC*, 506 Pa. 549, 486 A.2d 388 (1985). Next, plaintiffs appealed to the United States Supreme Court, which dismissed the appeal for want of a substantial federal question. *See Murphy v. PHRC*, 471 U.S. 1132 (1985).

C. *The District Court Proceedings*

In December 1985, the case was placed back on the active list in the district court. Defendants moved to dismiss, or in the alternative for summary judgment, on the ground that the federal suit was barred by the doctrine of claim preclusion. Initially, the district court denied this motion, reasoning that the basically injunctive remedy awarded by the PHRC, which was issued to serve the public interest rather than to redress private wrongs, should not bar plaintiffs' claims for the make-whole remedy that is authorized by Title VII. *See* Dist. Ct. Op. Denying Summary Judg. to Def's at 2 (Jan.

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time she receives the letter to file a civil action in district court against the party named in the charge. *See* 42 U.S.C. § 2000e-5(f)(1), -5(f)(3).

[4] There are twelve additional named plaintiffs in the instant action, but McNasby was the only one to file a charge with the EEOC.

14, 1987), J.A. at 615. The district court additionally found that both Crown Cork and the Union were bound under principles of issue preclusion by the findings established in the final decision of the PHRC that they engaged in sex discrimination against the plaintiffs. *See* Dist. Ct. Op. Granting Partial Summary Judg. to Pl's at 1 (Jan. 14, 1987), J.A. at 594.[5]

On June 15, 1988, Crown Cork again moved for summary judgment on the ground of claim preclusion based on this court's decision in *Gregory v. Chehi*, 843 F.2d 111 (3d Cir. 1988), which held that litigation of a federal claim can be barred by prior litigation of a state claim based on the same transaction even if "the relief obtainable in the two forums varies to some degree." *Id.* at 118. On November 1, 1988, the district court granted Crown Cork's motion and dismissed the suit with prejudice.

Noting that the federal courts are obliged to look to state law in determining the preclusive effect of a state court judgment, the district court reasoned that the plaintiffs' claims were precluded both by Pennsylvania common law and Pennsylvania statute. In terms of the common law, the district court accepted the premise that Pennsylvania would not preclude claims that are subject to exclusive federal jurisdiction. It noted that this court has recently held that federal jurisdiction over Title VII claims is exclusive, *see Bradshaw v. General Motors*

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[5] On January 15, 1987, the district court entered an order certifying a class, designating McNasby as class representative and allowing two other plaintiffs to intervene as class representatives. However, according to Crown Cork, the district court "later advised counsel that his Orders in this regard would be vacated, if necessary, so that Crown Cork could be heard on the class representation and certification issues." Appellee's Br. at 9 n.6.

Crown Cork and the Union appealed from the summary judgment determinations. This court dismissed the appeal for want of appellate jurisdiction. *See McNasby v. Crown Cork & Seal Co.*, 832 F.2d 47 (3d Cir. 1987), *cert. denied*, 108 S. Ct. 1112 (1988).

Corp., 805 F.2d 110, 112 (3d Cir. 1986), but nevertheless rejected plaintiffs' contention that the instant suit was not barred. It reasoned that "[p]laintiff has not shown that Title VII was within the exclusive jurisdiction of the federal courts at the times relevant to this case. Because the Pennsylvania courts considered themselves free to hear Title VII claims, McNasby's action would be precluded under Pennsylvania law." Dist. Ct. Op. at 6 (Nov. 1, 1988), J.A. at 991. The Court relied in this regard on *Chmill v. City of Pittsburgh*, 488 Pa. 470, 412 A.2d 860 (1980), discussed below in footnote 8.

Furthermore, the district court found that Pennsylvania common law precludes McNasby's claim. Relying on language in *Gregory* that mandated "that a cause of action or 'claim' . . . be defined broadly in transactional terms," Dist. Ct. Op. at 7, J.A. at 992, it found that the causes of action in state and federal court were identical for claim preclusion purposes because they were based on the same set of facts. Moreover, the court rejected an argument that McNasby was suing in a different "quality" or "capacity" in federal court. Additionally, the court found that "[the] Plaintiff ha[d] not shown the existence of any exceptions to the PHRC preclusion statute," 43 Pa. Cons. Stat. Ann. § 962(b), which prohibits subsequent actions based on the same "grievance" as a PHRA action. Dist. Ct. Op. at 10, J.A. at 995. Finally it found, pursuant to *Gregory*, that the mere fact that the plaintiffs received a remedy more limited than that available under Title VII did not bar preclusion.[6] This appeal followed.

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[6] In their rulings, the court rejected plaintiffs' arguments that it would violate *federal* law to find that the plaintiffs' claims were precluded. Rejecting plaintiffs' contentions about lack of personal participation and inability to be represented meaningfully by counsel in the PHRA proceeding, the court found that the minimum standards of due process had been met. Dist. Ct. Op. at 12-13, J.A. at 997-98. And it rejected plaintiffs' claim that no preclusion could attach because the "state judgment is based on a materially

II. CLAIM PRECLUSION

"Claim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit." *Migra v. Warren City School District Board of Education*, 465 U.S. 75, 77 n.1 (1984).[7] At issue here is whether plaintiffs are precluded from bringing their Title VII claim, which has never been heard by any court, because of its relationship to the claims litigated by the plaintiffs (other than Moyer) in the Pennsylvania state court system. We will begin by addressing claim preclusion as it affects McNasby. We will then address claim preclusion with respect to the other plaintiffs and class members.

The Supreme Court has interpreted the "full faith and credit clause" of 28 U.S.C. § 1738 to mean that "a federal court [must] refer to the preclusion law of the State in which judgment was rendered." *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985). In other words, "[s]ection 1738 requires federal courts to give the same preclusive effect to

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different legal standard from that required by Title VII." Dist. Ct. Op. at 17, J.A. at 1002, reasoning that this was no different than plaintiffs' argument that no preclusion should attach because the relief obtainable differed. Finally, relying on *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982), the district court rejected plaintiffs' contention that Title VII had impliedly repealed the statute that requires the federal courts to defer to the state law of res judicata. Dist. Ct. Op. at 19, J.A. at 1004.

[7] Claim preclusion must be distinguished from issue preclusion. "Issue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided." *Migra*, 465 U.S. at 77 n.1. This case provides a good example of the difference between claim and issue preclusion. Were we to uphold the district court's application of claim preclusion, we would affirm the dismissal of the plaintiffs' suit. On the other hand, the application of issue preclusion in the instant case would benefit the plaintiffs because many issues were determined in their favor by the PHRC.

state court judgments that those judgments would be given in the courts of the State from which the judgments emerged." *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 466 (1982). This rule applies when assessing both the issue preclusive and the claim preclusive effect of the prior state court judgment. *See Migra*, 465 U.S. 75 (1984) (applying section 1738 in the context of claim preclusion). Hence, in deciding whether McNasby's Title VII claim is barred, we must apply Pennsylvania's claim preclusion law.

A. *Common Law Preclusion*

Crown Cork first contends that McNasby's suit is barred by common law preclusion. Pennsylvania common law provides that claim preclusion applies to bar a subsequent suit when four factors have been met. In order for a second action to be precluded, "[t]he two actions must share an identity of the (1) thing sued on; (2) cause of action; (3) persons and parties to the action; and (4) quality or capacity of the parties suing or sued." *Gregory v. Chehi*, 843 F.2d 111, 116 (3d Cir. 1988) (citing *Dusquesne Slag Products Co. v. Lench*, 490 Pa. 102, 105, 415 A.2d 53, 56 (1980)).

However, as we held in *McCarter*, Pennsylvania does not bar the litigation of omitted claims that otherwise meet these four criteria, if those claims could not have been adjudicated by the initial court because that court would not have had subject matter jurisdiction over them. *See McCarter v. Mitcham*, No. 88-3654, slip op. at 7 (3d Cir. Aug. 16, 1989). Indeed, in expressing our belief as to Pennsylvania law in *McCarter*, we noted that the rule that no preclusion attaches when the first court did not have jurisdiction over the claim brought in the second action is "nearly universal[]." *Id.*; *see also Marrese*, 470 U.S. at 382 ("[C]laim preclusion generally does not apply where '[t]he plaintiff was unable to rely on a certain theory of the case . . . because of the limitations on the subject matter jurisdiction of the courts

. . .'" (quoting Restatement (Second) of Judgments § 26(1)(c) (1982)).

The reasoning behind this rule is that when there were barriers that prevented the litigant from advancing her theory in the first suit, it is "unfair to preclude [a litigant] from a second action in which [she] can present those phases of the claim which [she] was disabled from presenting in the first." *See* Restatement (Second) of Judgments § 26 comment c, at 236. Thus, in *McCarter*, we held that Pennsylvania would not preclude litigation of claims subject to exclusively federal jurisdiction. *McCarter*, slip op. at 11-12.

In litigating this case, the parties have raised issues with respect to the interplay of section 1738 and Title VII that border on the metaphysical. In the first place, the parties differ as to whether we should apply our own decision that Title VII jurisdiction is exclusively federal, *see Bradshaw*, 805 F.2d 110, or whether section 1738 requires us to defer to the opinion of the Pennsylvania courts on the matter, an issue reserved in *McCarter*. *See McCarter*, slip op. at 9. This issue is significant because Crown Cork contends that Pennsylvania believes that it has concurrent jurisdiction over Title VII actions. *See Chmill v. City of Pittsburgh*, 488 Pa. 470, 412 A.2d 860 (1980).[8] The parties also dispute whether the relevant

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[8] In *Chmill*, the Pennsylvania Supreme Court resolved an appeal, brought by white applicants for firefighting jobs, from a proposed order of the Pittsburgh Civil Service Commission that would have instituted a race-conscious hiring system. The white applicants contended that the order was invalid because it violated Title VII. The Court held that Title VII did not prohibit the Commission's action. Crown Cork contends that *Chmill* evidences the willingness of the Pennsylvania courts to exercise jurisdiction over Title VII actions.

Plaintiffs read *Chmill* differently. They contend that *Chmill* did not involve

> a claim or cause of action arising under Title VII. Rather Title VII was raised as a defense to an order entered by the

question is our (or Pennsylvania's) current opinion as to the exclusivity of Title VII jurisdiction, or whether instead we should look to the law as it existed at the time that the plaintiffs appealed to the Commonwealth Court, before we issue our opinion in *Bradshaw*.

Fortunately, we need not enter this quagmire, because in this case, it is clear that McNasby never pursued her state law claim in an adjudicative body that could have asserted original jurisdiction over her Title VII action. To the contrary, she proceeded straight from the PHRC to the Commonwealth Court to the Pennsylvania Supreme Court to the United States Supreme Court. None of these courts has original jurisdiction to hear a claim arising under Title VII.

Plaintiffs did not and could not have raised their Title VII claims before the PHRC, as the PHRC was created solely to administer the PHRA. *See* 43 Pa. Cons. Stat. Ann. § 956 (Purdon Supp. 1989). Under Pennsylvania law, "'[t]he power and authority to be exercised by administrative commissions must be conferred by legis-

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Pittsburgh Civil Rights Commission. Under the Supremacy Clause of the Constitution, Art. VI., the state courts were bound not to approve the action of the Pittsburgh Civil Rights Commission if that action violated substantive standards established by Congress in Title VII and applicable to the Commission.

Appellants' Br. at 20. Thus, plaintiffs assert that "[n]othing in the [*Chmill*] decision suggests that [the court] would have permitted the appellants to institute an original action arising under Title VII against the Commission in state court." *Id.*

Crown Cork also argues that *Bradshaw's* declaration that Title VII jurisdiction is exclusively federal was made without discussion and hence should be entitled to little weight. Although acknowledging that the Third Circuit Internal Operating Procedures Chapter 8 binds this court to the prior panel decision. It contends that Pennsylvania is more likely to follow what it contends is the better rule that states have concurrent jurisdiction in Title VII cases, as set forth in *Donnelly v. Yellow Freight System, Inc.*, 874 F.2d 402, 405-09 (7th Cir. 1989).

lative language clear and unmistakable.'" *PHRC v. St. Joe Minerals Corp.*, 476 Pa. 302, 310, 382 A.2d 731, 735-56 (1978) (citation omitted). Thus the PHRC does not have the power to entertain Title VII claims. Moreover, at the time McNasby filed her suit in Commonwealth Court, its original jurisdiction was limited to cases brought by or against the Commonwealth. *See* 42 Pa. Cons. Stat. Ann. § 761 (Purdon 1981). As for the Pennsylvania Supreme Court, it has original jurisdiction only over cases of (1) habeas corpus; (2) "[m]andamus or prohibition to courts of inferior jurisdiction;" and (3) "[q]uo warranto as to any officer of Statewide jurisdiction." *Id.* § 721. Finally, McNasby's Title VII suit clearly fell outside the original jurisdiction of the United States Supreme Court. *See* U.S. Const. art. III, § 2, cl. 2. Because McNasby proceeded only in adjudicative bodies of limited original jurisdiction, where she could not have asserted her Title VII claim, we conclude that Pennsylvania common law does not bar the subsequent litigation of McNasby's Title VII action in federal court.

Crown Cork concedes that the Commonwealth Court lacked original jurisdiction to entertain a Title VII action, but raises several arguments as to why Pennsylvania would apply common law preclusion nonetheless.

First, Crown Cork argues that the PHRC had "[original] jurisdiction over discrimination claims in general," and that it does not matter "under Pennsylvania law whether they were labeled 'PHRA' or 'Title V,'" because the two statutes are"functional[ly] identi[cal]." Defendant's Letter Br. at 7-8. However, what matters for preclusion purposes is whether the actual cause of action asserted in the second suit could have been asserted in the first. For example, although one could argue that in many ways the federal and Pennsylvania securities acts are functionally identical, in *McCarter* we found that Pennsylvania would not bar a suit based on federal securities law despite the state's dismissal of a state

securities suit, because the state court did not have jurisdiction over the federal cause of action. *See McCarter*, slip. op. at 11-12; *see also* Restatement (Second) of Judgments § 26, illustration 2, at 237 (1982) ("A Co. brings an action against B Co. in a state court under a state antitrust law and loses on the merits. It then commences an action in a federal court upon the same facts, charging violations of the federal antitrust laws, of which the federal courts have exclusive jurisdiction. The second action is not barred."). Thus, McNasby's Title VII claim is different from her parallel state law claim (at least for preclusion purposes), and the PHRC had jurisdiction to entertain only the latter.[9]

Second, Crown Cork contends that claim preclusion is available because the Commonwealth Court had appellate jurisdiction to review the PHRC determination. Crown Cork cites *Kremer*, in which the Supreme Court noted that a "judicial affirmance of an administrative determination is entiled to preclusive effect." 456 U.S. at 481 n.21. From this statement, Crown Cork concludes that "any limits on the original jurisdiction of the [Commonwealth Court] are irrelevant." Defendant's Letter Br. at 2. We disagree. *Kremer* merely held that preclusion *can* attach after limited judicial review of agency proceedings. The Court's further conclusion that preclusion *did* attach depended on its construction of the New York

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[9] Furthermore it appears that the PHRA and Title VII are not functionally identical. The primary purpose of the PHRA, as interpreted by the PHRC in the instant case, seems to be to vindicate the public interest, even at the expense of issuing make-whole relief to aggrieved plaintiffs. *See* Recommendation of Hearing Panel and Supplementary Opinion and Order at 11 (April 16, 1982), J.A. at 181 ("[T]he primary goal of the [PHRC] must be to vindicate the public interest."). In contrast, the primary purpose of Title VII is to make victims of discrimination whole. *See generally* 42 U.S.C. § 2000e. However, in view of the discussion in the text, we need not reach this issue.

statute at issue in that case. *See* 456 U.S. at 466-67; *infra* Typescript at 27. Under section 1738, however, we must apply Pennsylvania law in this case, and we decided in *McCarter* that Pennsylvania common law makes the original jurisdiction of some state tribunal not only relevant, but necessary. *See McCarter*, slip op. at 7. Because neither the PHRC nor the Commonwealth Court had original jurisdiction to hear McNasby's Title VII claim, common law claim preclusion is unavailable under Pennsylvania law.

Third, Crown Cork contends that this court's opinions in *Gregory v. Chehi*, 843 F.2d 111 (3d Cir. 1988), and *Davis v. United States Steel Supply*, 688 F.2d 166 (3d Cir. 1982), *cert. denied*, 460 U.S. 1014 (1983), are controlling. We disagree. Although both *Gregory* and *Davis* precluded civil rights plaintiffs from raising federal claims in federal court, each case involved an appeal of a municipal agency determination to the Pennsylvania Court of Common Pleas, a court of general original jurisdiction. *See* 843 F.2d at 114; 688 F.2d at 168-69. Thus we specifically noted in *Gregory* that the plaintiff could have brought his section 1983 action in that court. *See* 843 F.2d at 119 n.5. In both cases, therefore, plaintiffs had the opportunity that McNasby has never had—to have a state court hear her federal claim.

Fourth, Crown Cork contends that Pennsylvania has embarked upon a scheme to make the PHRC the exclusive arbiter of discrimination claims. However, we are unpersuaded that Pennsylvania has evinced by statute a specific intent to bar subsequent Title VII claims, in derogation of its common law rule that permits litigation of omitted claims over which the first court would not have jurisdiction. *See infra* slip op. at 21-28.

Finally, Crown Cork contends that Pennsylvania common law would preclude a claim based on the same " 'nub of the controversy' " as a prior claim, even if the first court did not have jurisdiction over the second claim.

As discussed above, we rejected this contention in *McCarter*, in which we stated our belief that under Pennsylvania common law preclusion does not attach when the first court did not have jurisdiction over the omitted claim. *See McCarter*, slip op. at 7. For the foregoing reasons, we do not believe that Pennsylvania common law precludes McNasby from bringing this Title VII action. We thus hold that the district court erred in dismissing her claim on common law res judicata grounds.

B. *Statutory Preclusion*

Crown Cork contends alternatively that McNasby's Title VII claim is precluded based on a Pennsylvania statute, which provides (with one exception not relevant to this case) that:

> nothing contained in [the PHRA] shall be deemed to repeal or supersede any of the provisions of any existing or hereafter adopted municipal ordinance, municipal charter or of any law of this Commonwealth relating to discrimination because of race, color, religious creed, ancestry, age, sex, national origin or handicap or disability, *but as to acts declared unlawful by [the PHRA], the procedure herein provided shall, when invoked, be exclusive and the final determination therein shall exclude any other action, civil or criminal, based on the same grievance of the complainant concerned.* If the complainant institutes any action based on such grievance without resorting to the procedure provided in this act, such complainant may not subsequently resort to the procedure herein.

43 Pa. Cons. Stat. Ann. § 962(b) (Purdon Supp. 1989) (emphasis added). Section 962(b) serves three functions. The first part of the first sentence makes clear that the PHRA is not intended to preempt municipal ordinances or charters or other state laws. The second part of the first sentence precludes a complainant from

relitigating a matter "based on the same grievance" as a matter brought by the complainant before the PHRC. Finally, the second sentence prohibits a litigant from pursuing a PHRA claim if she has instituted any action based on the same grievance without invoking the PHRA procedures. Crown Cork claims that, under the plain language of the second part of the first sentence, Pennsylvania would preclude a Title VII suit based on the same grievance as a case decided under the PHRA.

In support of its position, Crown Cork contends that the instant case is essentially indistinguishable from *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982), a case in which the Supreme Court held that a plaintiff's Title VII claim was precluded because the plaintiff had previously brought a claim based on the same transaction before the New York State Division of Human Rights ("NYDHR") and had appealed the NYDHR's adverse judgment to the Appellate Division of the New York Supreme Court. *See* 465 U.S. at 463-64.[10] In *Kremer*, the Court presumed that pursuant to a New York statute, which is quite similar to Pennsylvania's section 962(b), New York would preclude a litigant who had resorted to the judicial processes of the state from raising a subsequent Title VII claim based on the same grievance in federal court.[11]

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[10] The Court noted that the plaintiff could not be precluded merely because he had availed himself of state administrative procedures. *See* 465 U.S. at 469-70 & n.7. Instead, the Court found that the plaintiff was precluded because he had availed himself of the state's judicial processes. *Id.*

[11] The New York statute provides:

> Nothing contained in this article shall be deemed to repeal any of the provisions of the civil rights law or any other law of this state relating to discrimination because of race, creed, color or national origin; but, as to acts declared unlawful by [New York's anti-employment discrimination statute], the procedure herein provided shall, while pending, be exclusive; and the final determination therein shall exclude any other action,

Crown Cork also contends that this Court's holding that Title VII jurisdiction is exclusively federal, *see Bradshaw v. General Motors Corp.*, 805 F.2d 110 (3d Cir. 1986), does not affect the applicability of section 962(b) as a bar to Title VII actions brought *after* a PHRA action has been pursued in the state courts. It notes that the Supreme Court in *Kremer* expressly declined to reach the question whether jurisdiction over Title VII actions is exclusively federal. *See* 456 U.S. at 479 n.20. Hence, Crown Cork argues that the Court implicitly held that a state may by statute bar subsequent litigation, even if the federal claim sought to be asserted in the second action is within the exclusive jurisdiction of the federal courts. And the Court made this holding explicit in *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985), in which it noted that a state may bar litigation of a claim within exclusive federal jurisdiction so long as the federal statute does not create an exception to section 1738. *Id.* at 383, 386.[12]

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civil or criminal, based on the same grievance of the individual concerned.

N.Y. Exec. Law § 300 (McKinney 1972).

[12] In an Amicus brief, the EEOC contends that *Kremer* is distinguishable because in *Kremer* the plaintiff was barred by issue preclusion rather than claim preclusion. It argues that a state cannot bar through claim preclusion a Title VII claim within the exclusive jurisdiction of the federal courts. *See* Amicus Br. at 12 n.2. We find this distinction to be unconvincing. In the first place, *Migra* squarely rejected the argument that a federal statute could implicitly create an exception to section 1738 for purposes of issue preclusion but not claim preclusion. *See* 465 U.S. at 83-84. Moreover, *Kremer* squarely held that Title VII does not impliedly create an exception to section 1738. *See* 456 U.S. at 467-78. Finally, *Marrese* (a claim preclusion case) implied that federal courts must follow state rules that would preclude causes of action within the exclusive jurisdiction of federal courts unless the relevant federal statute implicitly creates an exception to section 1738. *See* 470 U.S. at 383, 386.

Although the issue is extremely close, we are persuaded that Pennsylvania would not construe section 962(b) as a bar to McNasby's action. As the plaintiffs point out, the Court in *Kremer* was merely predicting New York law; the Court's statement that New York would interpret its statute to bar subsequent Title VII actions does not bind us to conclude that Pennsylvania would interpret its similar statute similarly. *See Davis v. United States Steel Supply*, 688 F.2d 166, 187 (3d Cir. 1982) (Gibbons, J., dissenting) (noting that the Court "could not instruct in [*Kremer*] on the law of Pennsylvania. [I]t dealt, rather with a specific provision in the New York Human Rights Law."), *cert. denied*, 460 U.S. 1014 (1983). Furthermore, the Supreme Court's assertion that the New York law would bar a subsequent Title VII action is not particularly persuasive as a guide to predicting Pennsylvania's interpretation of its own statute because the plaintiff in *Kremer* conceded the point, and the Supreme Court settled the issue with one conclusory sentence.

Plaintiffs argue that the second part of the first sentence of section 962(b) merely bars a litigant who has maintained a PHRA action from later suing on the same grievance under a municipal ordinance or another state law and that the statute is inapplicable to subsequent suits brought under federal laws, like Title VII. They rely on the nearly unanimous en banc decision of the Pennsylvania Superior Court, an intermediate appellate court, in *Lukus v. Westinghouse Electric Corp.*, 276 Pa. Super. 232, 419 A.2d 431 (1980).[13] In *Lukus*, the plaintiff had brought a Title VII suit in federal court but abandoned that suit and sought to maintain a PHRA suit in the state system. Judge Spaeth, writing for the court, construed section 962 as follows:

> The provision makes clear that the Legislature was concerned with the relationship between the PHRA

[13] The court was unanimous except for Judge Van der Voort, who concurred in the result without filing an opinion.

> and any other 'municipal ordinance, municipal charter, or . . . law of this Commonwealth relating to discrimination;' *nowhere does the Legislature address the relationship between the PHRA and federal discrimination laws.* If the Legislature wished to limit the relief available under the PHRA to instances where the aggrieved individual had not sought federal remedies, we should have expected the Legislature to say so, especially since it has directed that the word "action (which is used in the second sentence of section 962(b)) shall normally be interpeted as '[a]ny suit or proceeding in any court of this Commonwealth,'" *i.e.*, not "in any court of the United States."

276 Pa. Super. at 269, 419 A.2d at 450-51 (emphasis added). The court thus concluded that the PHRA suit was not barred by the prior Title VII action.

We concede that, were it not for *Lukus*, we might well conclude that Pennsylvania would read the "any other action . . . based on the same grievance" language of section 962(b) as bar to subsequent federal claims. However, *Lukus* alters our view. First, we believe that under the language and reasoning of *Lukus*, McNasby's Title VII claim would not be barred by section 962(b). It is true, as Crown Cork points out, that the court in *Lukus* was construing the meaning of the second sentence of section 962(b), whereas in this suit we must predict how the Pennsylvania Supreme Court would interpret the second part of the first sentence. However, Crown Cork presents no good reason why Pennsylvania would believe that the two consecutive sentences, which are written in parallel language, should be construed differently. Furthermore, the reasoning espoused in *Lukus* applies equally to the two sentences. The Superior Court found that section 962(b) does not "address the relationship between the PHRA and federal discrimination laws." *Lukus*, 276 Pa. Super. at 269, 419 A.2d at 450-51. Under this view,

the statute could not bar federal claims after adjudication of parallel state claims any more than it bars state claims after adjudication of parallel federal claims. We believe that, to the extent that the Pennsylvania Supreme Court follows *Lukus*, it would necessarily conclude that the first sentence of the statute does not refer to federal law, but simply bars the relitigation under other state and municipal laws of a grievance brought before the PHRC.

Second, we believe that the Pennsylvania Supreme Court would follow *Lukus*. We note that "[d]ecisions of intermediate appellate courts of the state, while not conclusive, are 'indicia of how the state's highest court might decide' the issue." *McGowan v. University of Scranton*, 759 F.2d 287, 291 (3d Cir. 1985) (citation omitted). That would seem to be especially true when the intermediate court sits *en banc*, and almost unanimously joins the same opinion. Moreover, we believe that the Superior Court is persuasive in its analysis.

As the Superior Court noted, the first part of the first sentence of the statute (the non-preemption section) suggests that the Pennsylvania legislature had only state and local statutes in mind. Moreover, parsing the language of the statute, we note that in the first sentence the statute says that it does not preempt state or municipal laws "*but*" one cannot later bring another suit based on a grievance brought under the PHRA. In common usage, the conjunction "but" is used to signify an exception to or limitation of what is implied by the content of the previous clause. *See Webster's Third New International Dictionary* at 303 (1966). Consequently, the wording of the statute suggests that the first sentence should be read to mean that although municipal and state laws are not preempted, a multiplicity of suits cannot be based on *those* stautes. Although the language of the statute is not unambiguous, the use of the conjunction

"but" rather than "and" suggests that the legislature understood only the statutes with which the first clause was concerned.

Finally, we note that the original version of section 962(b), which contained the preclusion language, was passed in 1955. It thus preceded the enactment of Title VII and the explosion of federal antidiscrimination litigation by a number of years. The intent of the legislature is relevant in interpreting the ambiguity in section 962(b). In light of the chronology, it is impossible to conclude that the Pennsylvania legislature that adopted section 962(b) intended to preclude actions based on federal laws that did not yet exist.

The only argument that Crown Cork makes as to why the Supreme Court would not follow the *en banc* Superior Court is as follows. Crown Cork asserts that *Lukus* is "surely wrong" because "no rational state legislature would choose to preclude state law claims but not federal ones." Appellee's Br. at 17-18. We are not so persuaded. We simply do not agree with Crown Cork that it is unbelievable that a state would elect to give a litigant her choice of one state remedy as well as allowing her to pursue a Title VII claim separately, especially because there is no way for a litigant to join a Title VII claim to the appeal of a PHRC determination. *See supra* slip op. at 17-18. *Compare Gregory v. Chehi*, 843 F.2d 111, 119 n.5 (3d Cir. 1988) (noting that "plaintiff could have pursued his [federal] remedy . . . in the state court, which had concurrent jurisdiction with the district court to address and remedy violations of federal constitutional law").

In summary, Crown Cork has not persuaded us that the Pennsylvania Supreme Court would disagree with the nearly unanimous Superior Court. Moreover, the reasoning of the Superior Court in *Lukus* clearly leads to the conclusion that section 962(b) is simply irrelevant to

this case and thus has no effect on McNasby's ability to pursue her federal claims. We conclude that there is no statutory bar to McNasby's pursuing the instant action.

III. OTHER PLAINTIFFS AND CLASS MEMBERS

Our reasoning as to why McNasby's claim is not precluded is also valid with repsect to the other plaintiffs and class members, since they were no more involved in the state court system than McNasby. Most of the other named plaintiffs simply joined in the same appeals through the state court system, and plaintiff Moyer and the class members were not personally involved at all at the state court level (so they may have a stronger claim that they should not be precluded). Crown Cork has made no argument that would distinguish either group from McNasby such that it would be appropriate to preclude that group from litigation, despite our decision to allow McNasby to proceed.

Crown Cork also points out that McNasby is the only plaintiff or class member who filed a charge with the EEOC and received a right to sue letter. Filing a charge and receiving a right to sue letter are prerequisites to an individual's bringing suit under Title VII. *See* 42 U.S.C. § 2000e-5(f)(1), -(5)(f)(3). However, in *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975), the Supreme Court held that class members need not have filed their own charges in order to be entitled to relief in a class action. *See id.* at 414 n.8. Consequently, to the extent that the class was properly certified, a question not raised in this appeal, the other female employees and former employees of Crown Cork may piggy-back their backpay claims on McNasby's claim.[14]

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[14] The propriety of the class certification remains an open question in the district court. *See supra* note 5.

IV.

For the foregoing reasons, we will vacate the judgment of the district court and remand this case for further proceedings consistent with this opinion. Parties to bear their own costs.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 82-4258

ELIZABETH MCNASBY, *et al.*

v.

CROWN CORK & SEAL, INC., *et al.*

MEMORANDUM

GILES, J. November 1, 1988

In September of 1982, Elizabeth McNasby (McNasby) filed the present action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, as a class action on behalf of female workers at Crown Cork & Seal, Inc. (Crown). The complaint alleged that Crown and the Sheet Metal Production Workers Union, Local 266, had engaged in a pattern and practice of sex discrimination, particularly during the period between October 17, 1970 and December 31, 1975. McNasby filed her complaint with the EEOC on May 17, 1971. None of the other plaintiffs filed such a complaint.

The events from which McNasby's claims arise were also the subject of hearings before the Pennsylvania Human Relations Commission (PHRC). McNasby had filed a written complaint with the PHRC in June of 1971. The PHRC then filed an amended complaint which detailed the allegations of discrimination by the defendants and included affidavits from most of the plaintiffs in the present action. The Commission held thirty-seven days of

public hearings on the allegations of the complaint. On September 29, 1981, the PHRC issued its findings of fact and its final order. The Commission concluded that McNasby and the other plaintiffs were victims of discrimination, but granted very limited monetary relief to the victims.

McNasby and the other plaintiffs appealed the PHRC's decision to the Pennsylvania state appellate courts and to the United States Supreme Court. The Pennsylvania Commonwealth Court and the Pennsylvania Supreme Court affirmed the PHRC's decision. *See Murphy v. Commonwealth of Pennsylvania Human Relations Commission*, 77 Pa. Commw. 291 (1983); *Murphy v. Commonwealth of Pennsylvania Human Relations Commission*, 506 Pa. 549 (1983). McNasby's appeal to the United States Supreme Court was dismissed for want of a substantial federal question. *See Murphy v. Commonwealth of Pennsylvania Human Relations Commission*, 471 U.S. 1132 (1985).

McNasby had amended her EEOC complaint while the state court appeals were pending and brought the current action in federal court in September of 1982. The case was placed on the civil suspense docket pending the outcome of the state appeals and was returned to the active case list in December of 1985. Defendants filed a motion for summary judgment in January of 1986, but this motion was denied on the grounds that the PHRC was not entitled to *res judicata* effect because the PHRC did not fashion the "make-whole" remedy to which plaintiffs were entitled under Title VII.

Defendant Crown now moves for summary judgment based upon the recent decision of the United States Court of Appeals for the Third Circuit in *Gregory v. Chehi*, 843 F.2d 111 (3d Cir. 1988). Crown claims that the action stands or falls on McNasby's claims because she is the only plaintiff who filed a charge with the EEOC, a

prerequisite to filing a Title VII action. Plaintiff does not dispute this.

A federal court is bound by the Full Faith and Credit statute, 28 U.S.C. § 1738, in applying preclusion principles and must therefore give a prior state judgment the same preclusive effect as would be given to that judgment under the law of the state in which the judgment was rendered. *Gregory v. Chehi*, 843 F.2d at 116. If state law does not preclude relitigation, then the federal action may go forward. If state law does preclude relitigation, then the court must consider whether any circumstances exist which would prevent the application of § 1738.

I. *The Pennsylvania Law of Claim Preclusion*

a. *Statutory Preclusion*

Defendant contends that, under both Pennsylvania statutory and common law, McNasby's claims would be precluded in the Pennsylvania state courts. It argues that, under § 1738, plantiff's action must also be barred in federal court.

Defendant maintains that the Pennsylvania Human Relations Act (PHRA), under which McNasby brought her claim at the state level, contains a section which provides the Pennsylvania rule of claim preclusion. The statute provides:

> [A]s to acts declared unlawful by section five of this act the procedure herein provided shall, when invoked, be exclusive and the final determination therein shall exclude any other action, civil or criminal, based on the same grievance of the complainant concerned.

Pa. Stat. Ann. tit. 43, § 962(b) (Purdon Supp. 1988).

In *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 463 (1982), the Supreme Court addressed the issue

of whether a federal court in a Title VII case should give preclusive effect to a decision of a state court upholding a state administrative agency's rejection of an employment discrimination claim as meritless. Defendant argues that the Court in *Kremer* based its decision on a New York statute that is "virtually identical" to the PHRA statute in this case.

In *Kremer*, the New York administrative agency's decision was affirmed by both the agency's appeals board and the Appellate Division of the New York Supreme Court. The Court stated:

> There is no question that this judicial determination precludes Kremer from bringing "any other action, civil or criminal, based upon the same grievance" in the New York courts. N.Y. Exec. Law § 300 (McKinney) 1972. By its terms, therefore, § 1738 would appear to preclude Kremer from relitigating the same question in federal court.

Kremer, 456 U.S. at 467.

Plaintiff has not directly addressed the issue of the statute. Plaintiff's arguments are made under the Pennsylvania common law.

b. *The Pennsylvania Courts' Jurisdiction*

Plaintiff first argues that Pennsylvania courts would not apply claim preclusion to McNasby's Title VII claim because Title VII claims are within the exclusive jurisdiction of the federal courts. Under Pennsylvania law, a second tribunal will be bound by the findings of a first tribunal if the first court to adjudicate the matter had jurisdiction to hear the omitted claim. *See City of Philadelphia v. Stradford Arms, Inc.*, 274 A.2d 277, 280 (Pa. Cmwlth. 1971); *Gregory*, 845 F.2d at 117.

Plaintiff also cites the Supreme Court case of *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, (1985) which stated:

> With respect to matters that were not decided in the state proceedings, we note that claim preclusion generally does not apply where the plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy because of the limitations on the subject matter jurisdiction of the court.

Plaintiff claims that, under *Bradshaw v. General Motors Corp.*, 805 F.2d 110 (3d Cir. 1986), federal courts have exclusive jurisdiction over Title VII claims. Because the Pennsylvania court was not free to consider the Title VII claim, plaintiff argues, it would not be precluded under Pennsylvania law.

Defendant correctly asserts that, although the third circuit held that federal courts have exclusive jurisdiction over Title VII claims in *Bradshaw*, Pennsylvania courts were free to entertain Title VII claims at all relevant times during the course of the state proceedings in this case, 1970-1985). In *Chmill v. City of Pittsburgh*, 488 Pa. 470 (1980), the Pennsylvania Supreme Court considered and rejected a Title VII challenge to actions of the Pittsburgh Civil Service Commission. Defendant also points out that, in the present case, the PHRC considered Title VII with respect to statistical evidence and the remedial authority of the PHRC. Appendix to Motion of Defendant at 146, 156.

Plaintiff has not shown that Title VII was within the exclusive jurisdiction of the federal courts at the times relevant to this case. Because the Pennsylvania courts considered themselves free to hear Title VII claims, McNasby's action would be precluded under Pennsylvania law.

c. *Identity of Cause of Action*

Plaintiff next contends that Title VII and the state law discrimination claims are not the same causes of action and, as such, would not be awarded preclusive effect by

the Pennsylvania courts. Under Pennsylvania common law, a prior action has preclusive effect if there is:

(1) identity of subject matter;

(2) identity of causes of action;

(3) identity of persons and parties to the action;

(4) identity of the quality and capacity of the parties suing or being sued.

Gregory, 843 F.2d at 116 (citing *Duquesne Slag Products Co. v. Lench*, 490 Pa. 102, 105 (1980)). Plaintiff contends that it is sufficient that the PHRC claim and the Title VII claim are technically different causes of action and that Pennsylvania courts would not apply claim preclusion in such a situation.

In *Gregory*, the third circuit held that a cause of action or "claim" must be defined broadly in transactional terms, "regardless of the number of substantive theories advanced in the multiple suits by the plaintiff." 843 F.2d at 117 (citing Restatement (Second) of Judgments § 24). "A single cause of action may comprise claims under a number of different statutory and common law grounds." *Id.* (citation omitted). *Gregory* cited the Pennsylvania Supreme Court case of *Helmig v. Rockwell Mfg. Co.*, 389 Pa. 21 (1957), which barred a second action on the grounds that "the acts complained of in both actions [were] identical" and its prediction that the plaintiff would "inevitably call the same witnesses and present exactly the same evidence in this second action." 843 F.2d at 117 (citing *Helmig*, 389 Pa. at 30). The third circuit in *Gregory* concluded that:

> Multiple claims do not arise solely because a number of different legal theories deriving from a specific incident are used to assert liability. The transaction remains unitary 'although the several legal theories depend on different shadings of the facts,

> or would emphasize different elements of the facts, or would call for different measures of liability or different kinds of relief.'

843 F.2d at 117 (citing *Helmig*, 389 Pa. at 30). In addition, *Gregory* expressly held that it was not significant that one action was based on federal law while the other was based on state law. 843 F.2d at 118.

In the present case, there is no question that plaintiff's present action is based on the same set of facts litigated at the state level. The fact that McNasby's claim now rests on different statutory grounds is not sufficient, under Pennsylvania law, to be considered a different cause of action. This court is persuaded that the plaintiff had but one cause of action for employment discrimination, "even if different forms of relief were available and varying theories of constitutional and statutory violations potentially were applicable." 843 F.2d at 119.

d. *Identity of Quality and Capacity of Plaintiff*

Plaintiff next contends that Pennsylvania courts would not preclude McNasby's claim for supplemental relief under Title VII because she "was not a party in the same capacity in the administrative proceedings as she is in this lawsuit and did not have a full and fair opportunity to litigate in the prior proceedings her right to make whole relief." McNasby Brief at 16.

There is no requirement that plaintiff have a full and fair opportunity to litigate her claim under the Pennsylvania common law of claim preclusion. The requirements for claim preclusion are, as listed above, identity of the thing sued on, the cause of action, the parties, and the quality and capacity of the parties suing or being sued. *Gregory*, 843 F.2d at 116.

Plaintiff has attempted to fit her argument into the framework of claim preclusion law by arguing that there was no identity of the quality and capacity of

the person suing. Plaintiff argues that the quality of McNasby's participation in the proceedings before the PHRC differed significantly from the quality of her participation in the present case. Plaintiff maintains that McNasby was an actual complainant at the state administrative level, but was denied any control over the presentation of her claims. She claims that the PHRC, in representing her, failed to develop a record to support her post-1975 claims for relief. McNasby also points out that the Pennsylvania Supreme Court rejected McNasby's due process claims because it found that the complainants were not the "real parties in interest" and had no foundation for their constitutional claims. *See Murphy v. Commonwealth of Pennsylvania, Pennsylvania Human Relations Commission*, 506 Pa. 549 (1983).

Plaintiff contends that it is a generally recognized principle that a person who is not a party to litigation may be bound only to the extent that she openly and actively assumes control of and manages the litigation. Plaintiff cites *Charter Oak Fire Insurance Co. v. Sumitomo Marine and Fire Insurance Co.*, 750 F.2d 267, 270 (3d Cir. 1984), which held that, although the insurance companies in the federal action were not technically parties to the state action, they were "litigating nonparties" and bound by the state court judgment.

The decision in *Charter Oak* works against the plaintiff's position. There, the court actually expanded the reach of claim preclusion to one "who *assists* in the prosecution or defense of an action in aid of some interest of his own." 750 F.2d at 270 (citation omitted) (emphasis added). Plaintiff falls into this category and is thus bound by the state court judgments.

Plaintiff has not shown the existence of any exceptions to the PHRC preclusion statute, nor has she adequately argued that her claim is not precluded by Pennsylvania common law. Therefore, I conclude that Pennsylvania

law would preclude relitigation of the plaintiffs' claims in Pennsylvania state court. I now turn to an examination of plaintiff's argument that this court need not apply Pennsylvania law under the Full Faith and Credit statute, 28 U.S.C. § 1738, in the present case.

II. *The Application of § 1738*

Plaintiff argues that, even if Pennsylvania law would bar her from seeking additional relief, federal law permits her to do so. Plaintiff makes this argument on several grounds.

a. *Due Process*

McNasby first argues that the full faith and credit clause does not bar her claim for relief because she did not have a full and fair opportunity to litigate her damage claim in the state proceedings. Plaintiff contends that the Supreme Court has expressly recognized that, where the party against whom an earlier decision is raised as a bar did not have a full and fair opportunity to litigate a claim or issue, the earlier litigation will not bar relitigation on the claim or issue. *See Kremer*, 456 U.S. at 481-482 (citing *Allen v. McCurry*, 449 U.S. 90 (1980)).

Defendant argues that McNasby is precluded from raising a due process challenge to the adequacy of the state proceedings because she raised due process challenges in her state court appeals and in her petition for certiorari to the United States Supreme Court, and lost.

It is undisputed that McNasby raised the following questions in her appeal to the Pennsylvania Supreme Court:

> 5. Did the Court below err in ruling that the final order of the Human Relations Commission does not deprive Appellants and those similarly situated of Due Process of Law? Answered in the negative below.

> 6. Did the court below err in ruling that the final order of the Human Relations Commission does not deprive Appellants and those similarly situated of equal protection of the law? Answered in the negative below.

Defendant's Appendix at 537.

It is also undisputed that these issues were decided against McNasby. However, the Pennsylvania Supreme Court rejected the due process claims on the basis that the complainants were not the "real parties in interest" and had no foundation for their constitutional claims. *See Murphy*, 506 Pa. at 559.

I find that consideration of plaintiff's due process arguments is not precluded because of the state court appeals on this issue. The Pennsylvania Supreme Court did not consider the merit of plaintiff's claim. Plaintiff now has standing to challenge the due process of the PHRC proceedings because defendant is urging the application of § 1738 and the preclusion of plaintiff's claims.

Plaintiff contrasts the process the plaintiff in *Kremer* was afforded with the process she received and argues that *Kremer* gives some guidance as to what this "full and fair opportunity" entails. However, plaintiff ignores the holding of *Kremer* that state proceedings "need do no more than satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause in order to qualify for the full faith and credit guaranteed by federal law." 456 U.S. at 481.

The Court in *Kremer* stated:

> We must bear in mind that no single model of procedural fairness, let alone a particular form of procedure is dictated by the Due Process Clause . . . . The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.

456 U.S. at 483 (citations omitted).

Here, the PHRC provides for (1) the right of an individual to file a complaint with the Commission, (2) investigation by the Commission, (3) conciliation efforts by the Commission, (4) a public hearing, (5) the right of the complainant to appear, with or without counsel and submit testimony. Pa. Stat. Ann. tit. 43, § 959. The complainant is also entitled to judicial review of the PHRC decision. Pa. Stat. Ann. tit. 43, § 960.

In *Davis v. United States Steel Supply*, 688 F.2d 166, 172 (3d Cir. 1982), the third circuit held that the plaintiff's complaint to the Pittsburgh Commission on Human Relations, and her subsequent appeal to state court, barred her from bringing another action based on the same facts in federal court. In *Davis*, the Commission held a hearing in which nine witnesses, including plaintiff, testified and were subjected to cross-examination. Plaintiff challenged the due process she received in the administrative proceeding. The third circuit found that the procedures provided for under the Pittsburgh Act were "far more extensive than those upheld as adequate in *Kremer*." 688 F.2d at 172 n.6.

In this case, it is uncontested that a full hearing was held and forty-eight witnesses including McNasby, testified. Following the Commission's decision of August 28, 1981, both plaintiff and the Commission's general counsel petitioned the Commission to reconsider. McNasby's counsel raised constitutional arguments at that time. In addition, McNasby was willing to rely on the findings of fact on the merits of the administrative hearing in her action for supplemental relief in federal court. The plaintiff's willingness to rely on the record below in *Davis* was considered to be significant by the third circuit in determining whether the hearing had been procedurally adequate. Therefore, I find that the PHRC hearing was sufficient to meet the flexible requirements of the Due Process Clause.

b. *Relief*

Plaintiff next argues that Title VII authorizes persons who have been found to be victims of discrimination, but who have been denied "make-whole" relief in the state proceedings to obtain supplemental relief in a federal Title VII action. Although this court previously agreed with this argument, I must now change my judgment in light of the third circuit's recent decision in *Gregory*.

In *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980), the Supreme Court held that the "ultimate authority" to secure compliance with Title VII resides in the federal courts. 447 U.S. at 64 (citing *Alexander v. Gardener-Denver Co.*, 415 U.S. 36, 44-45 (1974)). The Court held that recourse to federal courts under Title VII is allowed when state courts do not provide adequate relief. It stated:

> It is clear from this scheme of interrelated and complementary state and federal enforcement that Congress viewed proceedings before the EEOC and in federal court as supplements to available state remedies for employment discrimination. Initial resort to state and local remedies is mandated, and recourse to the federal forums is appropriate only when the State does not provide prompt or complete relief.

447 U.S. at 65.

The *Kremer* Court found that the plaintiff's federal cause of action was barred by the state administrative hearing and its subsequent appellate review. I do not believe that *Kremer* overruled *Gaslight*. *Kremer* dealt with the preclusive effect of a judgment on the merits. *Gaslight* dealt with the preclusive effect of a decision on the issue of relief. In addition, *Kremer* involved a state court's affirmance of a state administrative agency's decision, while *Gaslight* involved only a state administrative agency's decision. The Court in *Kremer* stated:

> No provision of Title VII requires claimants to pursue in state court an unfavorable state administrative action, nor does the Act specify the weight a federal court should afford a final judgment by a state court if such a remedy is sought. While we have interpreted the "civil action" authorized to follow consideration by federal and state administrative *agencies* to be a trial *de novo*." . . . (citations omitted) neither the statute nor our decisions indicate that the final judgment of a state *court* is subject to redetermination at such a trial.

456 U.S. at 469-470. (emphasis in the original).

See also University of Tennessee v. Elliott, 478 U.S. 788 (1986).

Despite the fact that *Kremer* did not overrule *Gaslight*, plaintiff's action is barred by the recent third circuit case of *Gregory v. Chehi*, which appears to extend the holding of *Kremer*. In *Gregory*, the third circuit examined issue and claim preclusion in the context of a lawsuit brought under 42 U.S.C.A. § 1983. The plaintiff in *Gregory* demanded and received a hearing before the Lower Saucon, Pennsylvania Township Council upon his dismissal from his position as a police officer. Following a hearing, the council sustained the plaintiff's discharge. Plaintiff appealed to the Court of Common Pleas of Northampton County. The court upheld the Council's factual findings and the procedures it followed in sustaining the dismissal. Plaintiff did not appeal this decision to the state appellate court. However, he filed suit in federal court three months later seeking reinstatement and damages for alleged violations of his constitutional rights.

The district court held that the plaintiff's due process claim based on his allegation that he was denied his first amendment rights was barred by collateral estoppel. The court reasoned that, although the state court did not mention the first amendment, the issue had been fully

and fairly adjudicated in the context of an allegation of bias. 843 F.2d at 115.

The appellate court in *Gregory* extended the holding of *Kremer* to cover the issue of supplemental relief in a subsequent action where a state *court*, unlike the situation in *Gaslight*, has already ruled. The court stated:

> Distinct causes of action do not arise merely because the motivations alleged in the two forums differ. Nor, as we have observed, is it critical that one is based on federal law and the other on state law . . . . It is not significant that the *relief* obtained in the two forums varies to some degree.

843 F.2d at 118. (emphasis added).

In addition, the court expressly disapproved the holding in *Kelly v. Warminster Township Bd. of Supervisors*, 512 F. Supp. 658 (E.D. Pa. 1981), *aff'd mem.*, 681 F.2d 806 (3d Cir. 1981), *cert. denied*, 459 U.S. 834 (1982), to the extent that the court based its decision to allow the federal action to go forward on differences in the relief obtainable in federal and state court. 843 F.2d at 119.

c. Differences in Legal Standards

Plaintiff next contends that § 1738 does not apply where the prior state judgment is based on a materially different legal standard from that required by Title VII. Plaintiff relies on *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974), arguing that the Supreme Court refused to give a preclusive effect to an arbitrator's decision on the grounds that the arbitrator applied a different legal standard than that required by Title VII. Plaintiff's argument ignores the Supreme Court's later interpretation of *Gardner-Denver* in *Kremer*. The Court held:

> Arbitration decisions, of course, are not subject to the mandate of Section 1738. Furthermore, unlike arbitration hearings under collective-bargaining

> agreements, state fair employment practice laws are explicitly made part of the Title VII enforcement scheme . . . . *Gardner-Denver* also rested on the inappropriateness of arbitration as a forum for the resolution of Title VII claims. The arbitrator's task, we recognized, is to "effectuate the intent of the parties rather than the requirements of enacted legislation." . . . *These characteristics cannot be attributed to state administrative boards and state courts.*

456 U.S. at 477-478 (emphasis added).

Plaintiff also cites a New York district court case for the proposition that the plaintiff was entitled to bring a Title VII action in federal court despite a state administrative board rejection of her claim on the basis that "sex was a bona fide occupational qualification (BFOQ) for the position of correction officer . . ." *Reynolds v. New York State Department of Correction Services*, 568 F. Supp. 747 (S.D.N.Y. 1983). The district court observed that the state law conflicted with the Title VII standard that sex is not a BFOQ for that position. Plaintiff argues that the legal standards for fashioning a remedy under the PHRA and Title VII conflict and that the PHRC standard was less favorable to the plaintiff than required by Title VII.

Plaintiff acknowledges that *Gregory* held that the mere fact of a difference in available remedies does not, without more, prevent the application of claim preclusion. She argues, however, that the present case involves not a mere difference in available remedies, but the "difference in the legal standards by which the Congress has directed the remedy be determined . . . ." McNasby Brief at 35, n.10.

The relief obtainable in any forum is based upon the legal standards of that forum. Plaintiff's attempt to differenciate between "relief obtainable" and the legal standards by which the remedy is to be determined is

without merit. The difference between the two is a semantic one, at best.

d. *Implied Repeal of § 1738*

Finally, plaintiff argues that § 1738 was impliedly repealed by Title VII, to the limited extent necessary to permit the federal courts to carry out their mandate under Title VII.

In *Kremer*, the Supreme Court exhaustively discussed whether § 1738 was impliedly repealed by Title VII. The Court held:

> Nothing in the legislative history of the 1964 Act suggests that Congress considered it necessary or desirable to provide an absolute right to relitigate in federal court an issue resolved by a state court. While striving to craft an optimal niche for the States in the overall enforcement scheme, the legislators did not envision full litigation of a single claim in both state and federal forums.

456 U.S. at 474.

The Court concluded that neither the statutory language nor the congressional debates were sufficient to repeal "§ 1738's long-standing directive to federal courts." 456 U.S. at 476.

Plaintiff claims that her present position is not inconsistent with *Kremer* because the Court did not foreclose application of the doctrine of implied repeal as to particular issues, such as the issue of relief.

Plaintiff cites Congress' "clear statement that it is the duty of federal courts to provide make-whole relief for victims of discrimination" in support of her argument. While it is true that Congress so intended, this goal must be considered together with the fact that "no provision of Title VII requires claimants to pursue in state court an unfavorable state administrative action

. . . ." 456 U.S. at 469. Plaintiff was free to pursue a federal court action after the PHRC proceedings. By appealing the PHRC's adverse findings at the state level, McNasby "locked [herself] out of the federal courts. Under Section 1738 and traditional [claim preclusion] theory, we lack the power to let [her] in." *Wakeen v. Hoffman House, Inc.*, 724 F.2d 1238 (8th Cir. 1983).

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 82-4258

ELIZABETH MCNASBY, *et al.*

v.

CROWN CORK & SEAL, INC., *et al.*

JUDGMENT ORDER

AND NOW, this 1st day of November, 1988, it is hereby ORDERED that:

1. Defendant Crown Cork & Seal, Inc.'s motion for summary judgment is GRANTED;

2. Plaintiffs' claims are DISMISSED with prejudice;

3. JUDGMENT is entered in favor of the defendants.

BY THE COURT:

/s/ James S. Giles

J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-1893

MCNASBY, ELIZABETH, BERES, CATHERINE, ELLIOT, HENRIETTA, FELMEY, MARGARET, JACYSZYN, ANN, KNOWLES, VIRGINIA, MASON, LORRAINE, MCGRODY, EDITH, MOYER, BETTY (PONATH), MURPHY, JOAN, NEYER, ELEANOR, PEKALA, MARIE, and YOCUM, DORIS, on behalf of themselves and all others similarly situated,

Appellants

vs.

CROWN CORK AND SEAL CO., INC., and SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, AFL-CIO, a k a SHEET METAL PRODUCTION WORKERS' UNION, LOCAL 266

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 82-4258)

Present: BECKER, STAPLETON and ROSENN, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel May 22, 1989.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered November 1, 1988 be, and the same

is hereby vacated and the cause remanded to the said District Court for further proceedings consistent with the opinion of this Court. Each party to bear its own costs.

ATTEST:

/s/ M. Elizabeth Ferguson
M. ELIZABETH FERGUSON
Chief Deputy Clerk

October 11, 1989

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-1893

ELIZABETH MCNASBY, CATHERINE BERES, HENRIETTA ELLIOTT, MARGARET FELMEY, ANN JACYSZYN, VIRGINIA KNOWLES, LORRAINE MASON, EDITH MCGRODY, BETTY (PONATH) MOYER, JOAN MURPHY, ELEANOR NEYER, MARIE PEKLA, and DORIS YOCUM, on behalf of themselves and all others similary situated,

Appellants

vs.

CROWN CORK AND SEAL CO., INC., and SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, AFL-CIO, a/k/a SHEET METAL PRODUCTION WORKERS' UNION, LOCAL 266

Appellees

(D.C. Civ. No. 82-4258)

PRESENT: GIBBONS, *Chief Judge*, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN and NYGAARD, *Circuit Judges* and ROSENN, *Senior Circuit Judge.**

The petition for rehearing filed by appellees having been submitted to the judges who participated in the de-

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* As to panel rehearing only.

cision of this Court and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is DENIED.

BY THE COURT,

/s/ Illegible
ILLEGIBLE
Circuit Judge

Dated: Nov. 8, 1989